Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

HERERO PEOPLE'S REPARATION CORPORATION, *et al.*,

Petitioners,

v.

DEUTSCHE BANK, A.G., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there is a private right of action recognized in federal courts for violation of fundamental principles of international law.

II. If federal courts do not recognize a private right of action for violation of fundamental principles of international law, whether Petitioners were entitled under the removal statute to present their claim to the state court from which the case was removed.

LIST OF PARTIES

The following parties appeared below as appellants and appear in this Court as petitioners:

The Herero People's Reparation Corporation, Paramount Chief K. Riruako, Mburumba Kerina, Kurundiro Kapuuo, Cornelia Tjaueondja, Moses Nguarambuka, Hilde Kazakoka Kamberipa, Festus Koruicline, Uezuvanjo Tjihavgc, Ujeutu Tjihange, Moses Katuuo, Levy K. O. Nganjone (Neuebeclc), Festus Ndjai, Hoomajo Jjingee, Uelembuia Tjinawba, Jararaihe Tjingee, Hangekaoua Mbinge, Ehrens Jeja, Nathanael Uakumbua, Rudolph Kauzuu, Jaendekua Kapika, Ben Mbeuserua, Felix Kokaki, Samuel Upenduna, Majoor Festus Kamburona, Uetavera Tjiramic, Julius Katjingisiua, Gebharid Muesee, Nahanson Kaahangoro, Gerson Ngetunic, Niklaas Koujo, Esekiel Tjivikua, Puurijata Mgombe, Muhonune Tjiauiko, Elisa Muyahere, Usiel Zajerues, Vaundura Tjisuta, Kapika Motjinduiko, Katjimbatere Mbendura, Uaraa Mupeu, Kavari Hialonguru, Christor Vezuvapi Kazohua, Glamenots Mupurua, Ehrenfried Tjiputovandu, Ngorera Languemuna, Metheus Tjirdunda, Tuatupukua Hepute, Saulus Kasaona, Josef Tjivinde, Uakarenda Mbinge, Uatundauka Ngumbi, Vahenuna Tjitaura, Kaajsi Ngumbia, Komuzara Ngombe, Otto Tjituka, Paulus Ngombe, Tuakaako Tjinana, Junias Tjituka, Kazeire Tjiuma, Gabriel Mbeja, Ruhumba Leonard, Juen Kaetjavi, Jaas Tjimwine, Tjinae Tjingee, Jeturimba Hembinda, Ngorera Kapejatua, Ngunaihe Mbari, Mburura Matiti, Tjikuua Hkawite, Kaivaka Ngumbi, David Kavari, Katundu Inaauyova Matuvi, Uakamuina Tjiposa, Mbomi Ngumbi, Chief Hikuminue Kapika,

Hepute Jonas Nezeturisa, Ueripanda Hepute, Mujazerire Tjambiru, Hondjera Veriunelika Alma, Tjiniaka Tjijahura, Oliefarit Muhenje, Ratjirambo Rutjindo, Tjisuta Karukoro, Hambeka Muharukua, Urandaije Muharukua, Godfriedine Kamburona, Salinde Kamburona, Kavari Mahindiune, Tutjavi Ueritura, Chief Tjavara, Josef Japuhua, Benesius Hungua, Vekeura Ruhumba, Chief Tjipene Keja, James Zemburuka, Christopher Kaiko, Alex Hairo Kongootui, Chief Tjombe Fanuel, Tjindunda Muhuhamo, Elia Bautenna Tjiho Killon, Akahiko, Uavirikiza Tjihoto, Ngombe Hijakundi, Kawendisa Hevita, Kavebiu Tjituere, Elisa Bethuel Kariko, Tjisemo Tuiziua, Isaskar Rupingena, Tjitjaoro Mbinge, Bethlehem Maija, Tjanangombe Hembinda, John Tjakurupe, Adelheid Neueza Ndjahera-Tjijorokisa, Chief Hosea Kutako Foundation, Mike Pack, Mbakamua Katjangura, Isak Karaerua, Daniel Katuve, Ottman Katjangua, Else Matukarua, Christofine Kajangua, Tebulon Kaijangua, Elizabeth Kazohua, Gustaf Diekmam, Lucas Kaurora, Menesia Katjzembua, Albertus (Kaapehi) Schmidt, Eunice Katjizambua, Arcelaus N. Kaijangua, Ewald Kamujuuige, Ismael Ngeke Katjangua, Helen Diekmama, Uemumuno Kertjari, Victoria Kahoro, Leonard Kamuinjo, Isaskar Tjamburo, Euen Kavisene Von Heybrecht Katuamba, Claud Katuamba, Ephraim K. Kauaka, Magdalena Karuuombe, Gustav Rupingena, G.H. Mbaukua, Robert Krems, Yvonne Karupa, Herman Kurangera, Johannes Kamoruao, Grandson Peter Pomba, Simson Tjinape, Germans Toromba, Phellepus Behnson Marine, Kamezun Usiel, Humairndu Ezzard Albert, Luciane Njandereeko Tjiramba, Willemine Nunuhe, Ester Muhaniue, Ewald Kenatjongo, Karl Kaitjizemine (Karumbu), Angel Tjahere, Frieda Kanta, Prieska Mbunga, Gottfried

Mbunga, Alfons Tjiposa Mbaeva, Constanira Zatjinua, Menethe Murangi, Christotine Kanangure, Levi Jacobs Karita, Ernst Heii, Hiskia Raturua Mbaha, Andronikus Urmanaije Mazella, Elizabeth Muurua, Veronica Tjivikua, Erich Tjipeuja (Von Benningssen), Gotthardine Ngaizuvare, Martha Karurupara, Rudolph Windisch, Elder Mbapupua, Alaid Tjombonde, Erna Mbetjiha, Joel Mbetjiha, Presley Tjizkpa, Justophine Agnes Uetuzuva Tjiho, Festus Tjikuvira, Else Kaesora Mortukania, Angel Inaerihihe Mboundje, Josha Kantjiteo, M. K. Hevike, Christofine Ujava, Frieda Wamunika, Julia Tjipitua, Paul Kauatouojao, Toha Helele Keja, Werner Mbetjiha, Ebew-Ezer Rinatjike Kavindikiza, Joel Kombepe, Alexia Kandovazu Libbe, Nateus Kangen Maties, Meriam Mbekumuna Mattenwodt, Meriarie Ruhr Muvangua, Oscar Rukoro, Viceorine Tjiuer, and Alfons Kaijangua.

The following parties appeared below as appellee, and are respondents in this Court:

Deutsche Bank, A.G;

Woermann Line.

The following defendants appeared in the trial court, but did not appear on appeal:

Terex Corporation (dismissed without prejudice pursuant to F.R. Civ. P. 41(a)).

No other parties appeared below or have entered an appearance in this Court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No petitioner is owned or held in whole or in part by a parent corporation. No publicly held corporation owns 10% or more of the stock of any petitioner.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Rule 29.6 Corporate Disclosure Statement	v
Table of Contents	vi
Table of Cited Authorities	viii
Table of Appendices	xi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Grant of the Petition	4
I. The Circuit Court Opinion Invites Clarification by this Court of the Existence of a Private Cause of Action for Violations of Customary International Law	4

Contents

Page

II. The Circuit Court Opinion Weakens Removal Requirements, Offends Comity with Coequal State Courts, and Undercuts the Jurisdictional Nature of A Private Right of Action Analysis 6

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Agee v. Bush, 1996 WL 914110 9

American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, 36 S. Ct. 585, 586, 60 L. Ed. 987 (1916) 12

Filartiga v. Pena- Irala, 630 F.2d 876 (2d Cir.1980) 10

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983) 12

Herero People's Reparation Corporation, et al. v. Deutshce Bank, A.G., et al., 361 U.S. App., D.C. 468, 370 F.3d 1192 1

Herero People's Reparations Corporation, et al. v. Deutsche Bank, A.G., et al., 370 F.3d 1192 (C.A.D.C.) 5

International Science & Technology Institute, Inc. v. Inacom Communications Inc., 106 F.3d 1146 (4th Cir. 1997) 12

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L. Ed. 2d 650 (1986) 12

Cited Authorities

	Page
Miller v. Norfolk and Western Ry. Co., 834 F.2d 556 (6th Cir. 1987)	12
Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 119 S. Ct. 1563 (1999)	7
Sosa v. Alvarez-Machain, __ U.S. __, 124 S. Ct. 2739 (2004)	5, 6
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983)	11
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	1
28 U.S.C. § 1331	2, 11
28 U.S.C. § 1350	9
28 U.S.C. § 1441	1, 2
28 U.S.C. § 1446	3
28 U.S.C. § 1446(a)	8
28 U.S.C. § 1447(c)	1, 3, 10
28 U.S.C. § 1653	8

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 8(a)(1) 8

Fed. R. Civ. P. 12(b)(6) 13

Fed. R. Civ. P. 41(a) 3

Other Authorities:

Charles A. Wright, *et al.*, 13B *Federal Practice & Procedure* at § 3585 9

Turkiewicz, R., "The Roulette of Suffering," 9. *Cardozo Journal of International and Comparative Law* 297, 317 (Winter 2001) 11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Decided June 11, 2004 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Columbia Dated And Filed July 31, 2003 ..... 8a

Appendix C — Memorandum Opinion Of The United States District Court For The District Of Columbia Dated May 29, 2002 And Filed May 30, 2002 ..... 38a

OPINIONS BELOW

Final judgment was entered by the United States District Court for the District of Columbia on July 31, 2003. It is not reported. It is reproduced at Appendix B. The decision of the trial court denying plaintiff's Motion to Remand Pursuant to the First Sentence of 28 U.S.C. § 1447(c) was entered on May 30, 2002. It is not reported. It is reproduced at Appendix C.

Appellants noted their appeal to the United States Court of Appeals for the District of Columbia Circuit on August 15, 2003. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 11, 2004. The opinion is reported at *Herero People's Reparation Corporation, et al. v. Deutshce Bank, A.G., et al.* 361 U.S. App., D.C. 468, 370 F.3d 1192. It is reproduced at Appendix A.

STATEMENT OF JURISDICTION

The action was brought by petitioners in the Superior Court of the District of Columbia. Respondents relied on 28 U.S.C. § 1441, *et seq*. to effect removal.

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked pursuant under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331

28 U.S.C. §§ 1441, *et seq.*

STATEMENT OF THE CASE

Facts:

This case was initially brought in the Superior Court of the District of Columbia by the Herero Tribe of Namibia, individual members of the Herero Tribe and the Herero People's Reparations Corporation. The complaint alleged that, during the late Nineteenth and early Twentieth Centuries, in a chillingly-precise foreshadowing of the horrors of the Holocaust, the Respondents, in brutal partnership with the government of Imperial Germany, engaged in "explicitly sanctioned extermination, the destruction of tribal culture and social organization, concentration camps, forced labor, medical experimentation and the exploitation of women and children." Amended Complaint, *Introduction.*

As the trial court observed: "the present case asks the Court to examine the absolute depths of human existence, from the evils of imperialism to institutional slavery and genocide." The First Amended Complaint set out the sociological, ethnic and cultural backdrop to, and the irredeemable implementation by the Respondents of, the genocidal near-extermination of the Herero, and their subsequent enslavement and brutalization.

Proceedings Below:

This case commenced with the filing by the plaintiffs on June 13, 2001 in the Superior Court of the District of Columbia (the "Superior Court Action") of claims against Deutsche Bank A.G. ("Deutsche Bank"), Woermann Line ("Woermann") and Terex Corporation ("Terex").[1] The First Amended Complaint ("Am. Comp.") was filed July 30, 2001.

Relying on 28 U.S.C. § 1446, the Respondents filed a Notice of Removal on August 30, 2001. On October 1, 2001, plaintiffs filed Plaintiffs' Motion to Remand the Case Pursuant to the First Sentence of 28 U.S.C. § 1447(c) ("Motion to Remand"). On October 6, 2001, Deutsche Bank and Woermann filed Defendants' Joint Memorandum of Law in Opposition Plaintiffs' Motion to Remand the Case Pursuant to the First Sentence of 28 U.S.C. § 1447(c). On November 8, 2001, plaintiffs filed Plaintiffs' Reply to Defendants' Joint Memorandum of Law in Opposition Plaintiffs' Motion to Remand the Case Pursuant to the First Sentence of 28 U.S.C. § 1447(c).

The Motion to Remand was denied on May 30, 2002 (the "Remand Ruling").

Deutsche Bank A.G.'s Motion to Dismiss the Complaint (the "Deutsche Bank Motion"), and the Woermann Line's Motion to Dismiss (the "Woermann Motion") were filed April 30, 2002.

Plaintiffs filed oppositions to each motion on July 1, 2002.

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1. Terex was voluntarily dismissed without prejudice pursuant to Fed. R. Civ. P. 41(a) on September 5, 2001.

On June 30, 2003, the trial court dismissed Woermann Line for lack of personal jurisdiction.

On July 31, 2003, the trial court dismissed Deutsche Bank, concluding that, though the ". . . exact question appears to be a matter of first impression in this Circuit . . . given that the District of Columbia Circuit does not appear to recognize a private right of action for violations of international law . . . plaintiffs have failed to present a valid cause of action."

Petitioners noted their appeal to The United States Court of Appeals for the District of Columbia Circuit on August 15, 2003. On June 11, 2004, the judgment of the trial court was affirmed. Appendix A.

REASONS FOR GRANTING THE PETITION

I. The Circuit Court Opinion Invites Clarification By this Court of the Existence of a Private Cause of Action for Violations of Customary International Law

The Circuit Court set out judicial indicia for support of the concept — not "embraced" by the District of Columbia Circuit — of a private cause of action for violations of customary international law. As it wrote:

> It is not "insubstantial and frivolous" to assert that federal common law should provide a private cause of action for violations of customary international law. True, this circuit has not embraced the idea. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 n. 4 (D.C.Cir.1984) (Edwards, J.); *id.* at 799 (Bork, J.); *id.* at 823-27

> (Robb, J.); *Al Odah v. United States*, 321 F.3d 1134, 1147-49 (D.C.Cir.2003) (Randolph, J., concurring). But the Supreme Court has yet to rule on the subject, and the theory has received support in court decisions and law review articles. *See, e.g., Filartiga v. Pena- Irala*, 630 F.2d 876, 886-87 (2d Cir.1980); *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244, 1255 (C.D.Cal.1999) (citing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)), rev'd in part on other grounds, 251 F.3d 1230 (9th Cir.2001); *White v. Paulsen*, 997 F.Supp. 1380, 1383-84 (E.D.Wash.1998) (same); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2385- 86 (1991); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349 (1988).

Herero People's Reparations Corporation, et al. v. Deutsche Bank, A.G., et al., 370 F.3d 1192, 1195 (C.A.D.C. 2004).

Unlike the facts in *Sosa v. Alvarez-Machain*, __ U.S. __, 124 S. Ct. 2739 (2004), the Herero claims of slavery and of genocide each implicate a ". . . norm of customary international law so well defined. . .", *Sosa, supra*, at 2769, that the contours of a private right of action can be charted with illumination by this Court.

> The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by

> prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly. While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.

Sosa, *supra*, at 2763. Grant of the instant petition will provide the Court with an opportunity to dispel the confusion and the uncertainty which permeates federal judicial treatment of claims sounding in fundamental violations of international norms.

II. The Circuit Court Opinion Weakens Removal Requirements, Offends Comity With Coequal State Courts, and Undercuts the Jurisdictional Nature of A Private Right of Action Analysis

A determination that there is no private right of action in federal courts for violations of the law of nations cannot be harmonized with denial of Petitioners' motion to remand the case to the Superior Court of the District of Columbia. The consequence is not a mere intellectual quibble assaying the delicately-balanced mass of jurisdiction necessary to support a federal court's rejection, rather than remand, of a cause of action. Rather, the Circuit Court's approach, by unnecessarily weakening removal requirements, offends principles of comity with coequal state courts.

As this Court observed in assessing whether jurisdictional determinations should precede personal jurisdiction challenges:

> Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design. A State's dignitary interest bears consideration when a district court exercises discretion in a case of this order. . . . (I)n most instances subject-matter jurisdiction will involve no arduous inquiry. . . . ("engag[ing]" subject-matter jurisdiction "at the outset of a case . . . [is] often . . . the most efficient way of going"). In such cases, both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first.

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587-88, 119 S. Ct. 1563 (1999).

Petitioners selected the Superior Court of the District of Columbia as their forum. Following Respondents' removal of the case to the United States District Court for the District of Columbia, Petitioners timely sought remand to the state court, because the removal petition failed to effectively assert the existence of federal jurisdiction.

The Notice alleged, so far as is pertinent hereto, as follows:

> 4. The Complaint alleges, *inter alia*, that the Defendants, during the period 1890 to 1915, in

> alliance with Imperial Germany, committed acts in violation of United States law and international law in Southwest Africa. On its face, the Complaint states the Plaintiffs' claims arise under, and jurisdiction is based on, *inter alia*, "United States law" and "international law." Complaint, Page 21.
>
> 5. Accordingly, pursuant to the allegations of the Complaint, this is a civil action of which this Court has original jurisdiction pursuant to 28 U.S.C. § 1331, and is one which may be removed to this Court by the Defendants pursuant to 28 U.S.C. § 1441. JA 75.

Those representations are and were insufficient to support removal.

28 U.S.C. § 1446(a) provides:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.[2]

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2. *See* and *Compare* Fed. R. Civ. P. 8(a)(1), which provides, in pertinent part, that "(a) pleading . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." And *see* 28 U.S.C. § 1653 (amendment of defective allegations of jurisdiction).

It is well established that:

> . . . (T)he notice must make the basis for the federal court's exercise of removal jurisdiction clear. . . . (T)he same liberal rules employed in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of removal.

Charles A. Wright, *et al.*, 13B *Federal Practice & Procedure* at § 3585.

The notice made no affirmative claim of subject matter jurisdiction. Rather, Respondents only referred to language of the complaint ". . . on its face . . ." and justified the removal ". . . pursuant to the allegation of the complaint. . . ." *See* and *compare Agee v. Bush*, 1996 WL 914110, at footnote 3 ("Defendant's notice of removal plainly states that this court has original jurisdiction over this action by reason of diversity pursuant to 28 U.S.C. § 1332. . . . In addition, defendants assert that complete diversity exists between the parties. . . .").

Petitioners then argued, and reiterate here, that: "(w)hile this Court may have original subject matter jurisdiction over the claims of the plaintiffs,[3] the failure of defendants to affirmatively assert the basis of the court's jurisdiction constitutes a defect which mandates remand to the court in which the action was originally filed." In their Reply, Petitioners argued that "in many circumstances, a particularized factual finding or legal conclusion will affect the disposition of both jurisdictional and federal cause of

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3. Plaintiffs specifically identified the Alien Tort Claims Act, 28 U.S.C. § 1350.

action issues." Petitioners added that "the prospect of that *post hoc* reconstruction" underscored the need for precision from the parties seeking to sustain the removal. That predictive caution proved to be well-taken.

Relying in part on *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the trial court denied plaintiffs' motion to remand, concluding that the Amended Complaint's reference to and reliance on international law triggered federal question jurisdiction. The trial court added: "Additionally, if evidence in this case presented at a later date reveals that the court in fact lacks subject matter jurisdiction, the Court may remand the case to the Superior Court of the District of Columbia under 28 U.S.C. § 1447(c)[4] . . . ."

Section 1447(c) is the statutory corollary for this Court's recognition of the complementary nature of the federal and state court systems, and of the states' dignitary interests in presiding over claims appropriate for state court resolution. Strict compliance with its requirements is neither burdensome nor inappropriate, given the interests at stake. The affirmance by the Circuit Court weakened the requirements imposed on defendants seeking removal, by excusing them from affirmatively asserting the existence of federal subject matter jurisdiction. As a result, a federal court which lacked, in its own view, a federal cause of action, nonetheless deprived a state court of its ability to dispose of a case brought before it.

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4. "If, at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded (emphasis added)."

The adverse impact of the Remand Ruling on comity with state courts could have been ameliorated if the trial court or the Circuit Court adopted the view that the absence of a private right of action implicated subject matter jurisdiction. Commentators have recognized that judicial disposition of a private right of action to enforce violations of the law of nations is a jurisdictional inquiry.

> Despite some early success under the Alien Tort Claims Act for torts committed "in violation of the law of nations," the courts have expressed misgivings about whether the "arising under" requirement for a federal question is met by customary international law norms that do not expressly provide for a private right of action."

Turkiewicz, R., "The Roulette of Suffering,"9. Cardozo Journal of *International and Comparative Law* 297, 317 (Winter 2001). The jurisdictional nature of private right of action inquiries is not limited to cases under international law, but is universally accepted and applied as a hallmark of federal jurisdiction.

Generally, of course, even though Congress has conferred general federal-question jurisdiction on the district courts under 28 U.S.C. § 1331 in terms similar to the constitutional provision — "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" — the term "arising under" in the statute is narrower than the similarly defined constitutional power. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495, 103 S. Ct. 1962, 1972, 76 L. Ed. 2d 81 (1983). Congress gave federal-question jurisdiction to district courts under 28 U.S.C. § 1331 to hear "only those

cases in which a well-pleaded complaint establishes either [1] that federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 2856, 77 L. Ed. 2d 420 (1983).

In the "vast majority" of cases where federal question jurisdiction exists, federal law creates the plaintiff's right of action. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986), and *see American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 586, 60 L. Ed. 987 (1916) ("A suit arises under the law that creates the cause of action").

In the absence of a private right of action, therefore, the federal court lacks subject matter jurisdiction. Thus, in *Merrell Dow*, *supra*, this Court determined that there was no federal jurisdiction for a claim under the federal Food, Drug and Cosmetic Act because there was no private right of action. Similarly, in *International Science & Technology Institute, Inc. v. Inacom Communications Inc.*, 106 F.3d 1146 (4th Cir. 1997) the Fourth Circuit affirmed the trial court determination that there was no federal question subject matter jurisdiction over claims under the Telephone Consumer Protection Act in the absence of a private right of action. *Accord*, *Miller v. Norfolk and Western Ry. Co.*, 834 F.2d 556, 563 (6th Cir. 1987).

The trial court concluded that "District of Columbia Circuit precedent *clearly* counsels against recognizing a cause of action for violations of international law in the absence of a federal statute (emphasis added)." The Circuit Court was

less assertive, noting only that it had not "embraced" the idea. Under a jurisdictional analysis, particularly including an analysis undertaken pursuant to removal from a state court and a motion to remand, that determination should have resulted in a remand to the state court, rather than a disposition under Rule 12(b)(6). If the claims set out in the Amended Complaint lacked a private right of action, it erred as a matter of law, and offended fundamental notions of comity with a coequal state court, by failing to remand the case to the state court.

Grant of the instant petition will undo erosion to the dignitary interests of state courts, and will foster the comity and cooperation that the federal-state relationship requires.

CONCLUSION

On the basis of the foregoing, a writ of certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JUNE 11, 2004

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 2, 2004 Decided June 11, 2004

No. 03-7110

THE HERERO PEOPLE'S REPARATIONS CORPORATION, et al.,

Appellants,

v.

DEUTSCHE BANK, A.G. and WOERMANN LINE, d/b/a DEUTSCHE AFRIKA-LINIEN GMBLT & COMPANY,

Appellees.

Appeal from the United States District Court for the District of Columbia (01cv01868)

Before: HENDERSON, RANDOLPH, and ROBERTS, *Circuit Judges*.

RANDOLPH, *Circuit Judge*: Those who appeal the dismissal of their complaint for failure to state a claim ordinarily argue their claim has merit. In this case, the

appellants seek to convince us their claim had far less merit than the district court believed; that it was, in fact, so insubstantial that federal question jurisdiction did not exist. A ruling to this effect would send the case back to the Superior Court of the District of Columbia where it began and would, appellants hope, prevent preclusion of a nearly identical complaint they filed in the Southern District of New York.

Appellants are the Herero Tribe of Namibia, members of the Tribe, and an association representing its interests. Their complaint alleged that in the late 19th and early 20th centuries Imperial Germany launched a campaign of atrocities against the Herero using torture, slavery, and genocide. The Herero sought damages from Deutsche Bank and Woermann Line, German companies whom they accused of participating in the atrocities.

The voluminous complaint, filed in Superior Court, did not identify the specific law supplying the cause of action. It did state that "[w]ell recognized principles of District of Columbia law, United States law, and international law provide this court with jurisdiction. . . ." Later references to law mentioned the defendants' violations of "international law" and commission of "crimes against humanity."

Defendants removed the complaint to federal district court. The Herero moved to remand. They did not contest the existence of federal jurisdiction but merely questioned the formal adequacy of the removal petition. The district court denied the motion, ruling that the removal petition was adequate, and that the complaint's international law claims presented a federal question. The defendants then moved to

dismiss. The district court granted Woermann Line's motion to dismiss for lack of personal jurisdiction, Fed. R. Civ. P. 12(b)(2), ruling that the company did not have sufficient contacts with the District of Columbia to satisfy the District's long-arm statute, D.C. Code § 13-423. The following day, the court granted Deutsche Bank's motion to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), ruling that federal common law provides no private cause of action for violations of customary international law.[1]

The Herero argue that the absence of a cause of action deprived the district court of subject matter jurisdiction. They say that once the district court concluded no cause of action existed, it should have remanded the case to the Superior Court pursuant to 28 U.S.C. § 1447. Generally, the question whether a cause of action exists calls for a judgment on the merits, not jurisdiction. *Bell v. Hood*, 327 U.S. 678 (1946); *Silverman v. Barry*, 727 F.2d 1121, 1124-25 (D.C. Cir. 1984). If a plaintiff purports to assert a federal claim, the district court has federal question jurisdiction unless the claim is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. at 682-83. *See generally* 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 3564 (2d ed. 1984). Since the Herero did not want to be in federal court, we can be confident that they did not assert an immaterial federal claim for the purpose of obtaining federal jurisdiction. The question therefore is whether their claim was "wholly insubstantial and frivolous."

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1. Some courts have held that the Alien Tort Act, 28 U.S.C. § 1350, provides such a cause of action. *See Al Odah v. United States*, 321 F.3d 1134, 1145-46 (D.C. Cir. 2003) (Randolph, J., concurring) (collecting cases). But the Herero explicitly disclaimed reliance on that statute.

Before we decide that question, we must determine whether the Herero actually raised any federal claims, substantial or otherwise. Unlike *Bell v. Hood*, the complaint in this case did not explicitly assert that the claims were grounded in federal law. But that cannot be dispositive. State law, like the federal rules, may not require plaintiffs to identify the legal basis for their cause of action, so complaints arising under the laws of the United States, and thus removable under § 1441, will not necessarily mention federal law. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Avco Corp. v. Machinists*, 390 U.S. 557 (1968); *Sylgab Steel & Wire Corp. v. Strickland Transp. Co.*, 270 F. Supp. 264 (E.D.N.Y. 1967) (Weinstein, J.). Several factors indicate that the Herero were asserting federal claims. First, international law was the only law the complaint accused the defendants of violating. Such claims would only be cognizable under federal law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964). Second, in their motion to remand, the Herero did not deny they were asserting federal claims, and they did not suggest any non-federal claims they might otherwise be asserting. Third, in their oppositions to the motions to dismiss, the Herero explicitly asserted that their claims were founded on federal common law or international law. They presented no non-federal theories.

A claim is too "insubstantial and frivolous" to support federal question jurisdiction when it is "obviously without merit" or when "its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hagans v. Lavine*, 415 U.S. 528, 538 (1974)

(citations omitted); *Silverman*, 727 F.2d at 1124. It is not "insubstantial and frivolous" to assert that federal common law should provide a private cause of action for violations of customary international law. True, this circuit has not embraced the idea. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 n.4 (D.C. Cir. 1984) (Edwards, J.); *id.* at 799 (Bork, J.); *id.* at 823-27 (Robb, J.); *Al Odah v. United States*, 321 F.3d 1134, 1147-49 (D.C. Cir. 2003) (Randolph, J., concurring). But the Supreme Court has yet to rule on the subject, and the theory has received support in court decisions and law review articles. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1255 (C.D. Cal. 1999) (citing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)), *rev'd in part on other grounds*, 251 F.3d 1230 (9th Cir. 2001); *White v. Paulsen*, 997 F. Supp. 1380, 1383-84 (E.D. Wash. 1998) (same); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2385-86 (1991); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349 (1988). That makes this case indistinguishable from *Bell v. Hood*. In both cases, the complaints alleged clear violations of law — there the Fourth Amendment, here customary international law — presenting only the previously unresolved question whether federal common law provided a remedy.

The Herero rely on the fact that, in *Tel-Oren*, Judges Edwards and Bork characterized their rejection of the federal common law theory as jurisdictional. *Id.* at 779 n.4 (Edwards, J.); *id.* at 799 (Bork, J.). However, the merits-jurisdiction distinction did not arise in that case, and neither

judge sought to distinguish *Bell* or to apply its "insubstantial and frivolous" exception. "[I]t is impossible to believe that the Court intended by mere stroke of the pen to obliterate a distinction [between jurisdiction and merits] that it had consistently drawn for many decades." *Fogel v. Chestnutt*, 668 F.2d 100, 107 (2d Cir. 1981) (Friendly, J.) (referring to *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)). Instead, it appears the *Tel-Oren* opinions were written as if the line between jurisdiction and merits was unimportant to the outcome. *See id.* at 105-07.

The complaint in this case also stated an arguable claim under the Alien Tort Act, 28 U.S.C. § 1350. While this court has not decided exactly what the Alien Tort Act means, *see Al Odah v. United States*, 321 F.3d 1134, 1145-50 (D.C. Cir. 2003) (Randolph, J., concurring), it is not frivolous to assert that it creates a cause of action. Several other circuits have ruled that it does. *See id.* at 1145-46 (collecting cases). After removal, the Herero sought to disclaim reliance on the Alien Tort Act. But a plaintiff's change in legal theory cannot defeat jurisdiction if a federal question appeared on the face of the complaint. *See Felice v. Sever*, 985 F.2d 1221 (3d Cir. 1993). The complaint here stated a nonfrivolous federal claim under one theory or another, and the district court therefore did not err in ruling on the merits.[2]

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2. The Herero argue that, even so, the district court abused its discretion by denying them leave to amend the complaint to meet the defendants' objections. But the Herero never properly moved to amend, either before or after the district court's decision. *See Gov't of Guam v. Am. President Lines*, 28 F.3d 142, 149-51 (D.C. Cir. 1994); *Confederate Mem'l Ass'n v. Hines*, 995 F.2d 295, 299-300 (D.C. Cir. 1993).

The Herero also appeal the dismissal of Woermann Line for lack of personal jurisdiction.[3] They argue the district court could have exercised its "universal jurisdiction" over the company. Universal jurisdiction is a doctrine of international law allowing states to define and punish certain crimes considered to be of "universal concern." *See United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir. 1998); Restatement (Third) of Foreign Relations Law of the United States § 404 (1987). Even if the concept applied in a civil case without any authorizing statute, under our system a federal court generally cannot exercise personal jurisdiction over a defendant unless Fed. R. Civ. P. 4 authorizes service of process. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). The Herero no longer allege that jurisdiction is appropriate under the District of Columbia long-arm statute, *see* Fed. R. Civ. P. 4(k)(1)(A), nor do they allege that service is "authorized by a statute of the United States," *see* Fed. R. Civ. P. 4(k)(1)(D). While they do argue that jurisdiction exists under Fed. R. Civ. P. 4(k)(2), they did not raise that point below. This leaves the Herero without a statutory basis for asserting jurisdiction over Woermann Line.

Affirmed.

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3. Woermann Line suggests that, if we affirm the district court's Rule 12(b)(6) dismissal, we need not reach the personal jurisdiction issue. However, Woermann Line's dismissal for lack of personal jurisdiction came before the district court's ruling on the merits. Since Woermann Line was not a party when the district court dismissed the complaint, the second ruling has no effect on its dispute with the Herero. If Woermann Line wanted to enjoy the possible preclusive effects of the 12(b)(6) dismissal, it should have waived lack of personal jurisdiction.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED JULY 31, 2003

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. No. 01-01868 (CKK)

THE HERERO PEOPLE'S REPARATIONS CORPORATION, *et al.*,

Plaintiffs,

v.

DEUTSCHE BANK AG, *et al.*,

Defendants.

MEMORANDUM OPINION
(July 31, 2003)

This case is brought by the Herero People's Reparations Corporation, the Herero Tribe of Namibia, and individual members of the Herero Tribe (collectively "Plaintiffs"), who allege that during the late Nineteenth and early Twentieth Centuries, Defendants, Deutsche Bank AG, Terex Corporation,[1] and Woermann Line,[2] in cooperation with the

1. On September 5, 2001, Plaintiffs filed a Notice of Dismissal without prejudice with respect to Terex Corporation pursuant to Federal Rule of Civil Procedure 41(a).

2. On June 30, 2003, the Court dismissed Plaintiffs' claims against Defendant Woermann Line for lack of personal jurisdiction. *Herero People's Reparations Corp. v. Deutsche Bank AG*, Civ. No. 01-1868, slip op. (D.D.C. June 30, 2003).

government of Imperial Germany, engaged in "explicitly sanctioned extermination, the destruction of tribal culture and social organization, concentration camps, forced labor, medical experimentation and the exploitation of women and children in order to advance their common financial interests." Am. Compl. Introduction. Defendants Deutsche Bank and Woermann Line filed separate Motions to Dismiss the present action, but each Defendant incorporated and adopted many of the arguments of its respective co-Defendant. *See, e.g.*, Def. Deutsche Bank's Mem. in Support of Mot. to Dismiss at 2-4; Def. Woermann Line's Mem. in Support of Mot. to Dismiss at 1-2; *see also infra* note 8. Because Plaintiffs voluntarily dismissed their claims against Terex Corporation, and the claims against Defendant Woermann Line were dismissed for lack of personal jurisdiction, only Defendant Deutsche Bank's pending motions remain to be considered by this Court.[3] After reviewing Defendants' Motions, Plaintiffs' Oppositions, Defendants' Replies, and the applicable law, the Court shall grant Defendant Deutsche Bank's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

I. BACKGROUND

The present case asks the Court to examine the absolute depths of human existence, from the evils of imperialism to institutional slavery and genocide. Plaintiffs allege that Defendants, as members of the "German colonial enterprise,"

3. Defendant Deutsche Bank has moved to dismiss the Amended Complaint under Federal Rules of Civil Procedure 8(a)(2), 12(b)(1), and 12(b)(6). *See also infra* note 8.

systematically murdered thousands of Herero men, women, and children. Am. Compl. ¶¶ 104-109. The atrocities allegedly committed by Defendants span a twenty-five-year period between 1890 and 1915, *id.* ¶¶ 151-165, and include:

> (a) initiation of and implementation of a race war against the Herero; (b) initiation of and implementation of an implicit and explicit campaign of genocide, extermination and extirpation of the Hereros; (c) the brutalization and enslavement of the Hereros, and the systematic use of forced labor; (d) the systematic forced degradation of Herero women held as captives; and (e) the systematic destruction of the Herero culture.

Id. ¶¶ 148-150. During this period of time, Plaintiffs contend that "[o]ut of 80,000 men, women and children, the German colonial enterprise had exterminated all but 15,000." *Id.* ¶ 114. According to the Amended Complaint, the remaining Herero, some 10,632 women and children and 4,137 men, were placed in German concentration camps. *Id.*

Plaintiffs' Amended Complaint asserts that each of these acts constitutes a "crime against humanity and was a crime against humanity from 1890 to 1915." *Id.* ¶¶ 152-56. Moreover, according to Plaintiffs, each of these acts, including the "intentional destruction of a tribe," "slavery," and the "[s]ystematic abuse of women," is a "violation of international law and was a violation of international law from 1890 to 1915," *id.* ¶¶ 157-62, and as "an ethnic, racial, political and cultural group," the Herero Tribe is "entitled to

the protection of international law," *id.* ¶ 163. The Amended Complaint seeks relief in the "amount of two billion dollars ($2,000,000,000) or such other amount as may be proven at trial." *Id.* at 65 ("Wherefore" Paragraph).

Plaintiffs filed their Complaint in Superior Court of the District of Columbia pursuant to D.C. Code § 11-921[4] and "on principles of universal jurisdiction applicable to crimes against humanity, genocidal practices and human rights atrocities," *id.* ¶ 1, but did not specify a statute or precedent in support of a cause of action in their Amended Complaint, see generally *id.*; *see also Herero People's Reparations Corp. v. Deutsche Bank AG*, Civ. No. 01-1868, slip op. at 4 (D.D.C. May 30, 2002) (memorandum opinion denying Plaintiffs' motion for remand) [hereinafter "Remand Opinion"] ("In the present case, Plaintiffs' complaint, motion to remand, and reply to Defendants' memorandum do not mention any specific state statute or common law theory under which they seek recovery. Their complaint refers to 'principles of District of Columbia law, United States law, and international law,' and to 'principles of universal jurisdiction applicable to crime [sic] against humanity, genocidal practices and human rights atrocities.'") (quoting Compl. Introduction, ¶ 1).

On August 30, 2001, Defendants successfully removed this case to the United States District Court for the District of Columbia under 28 U.S.C. § 1441. Pursuant to the

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4. Section 921 states in relevant part: "the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia." D.C. Code § 11-921.

requirements of 28 U.S.C. § 1446(a),[5] Defendants stated that Plaintiffs' claims of jurisdiction based on "United States law" and "international law" placed the case under federal question jurisdiction pursuant to 28 U.S.C. § 1331.[6] On October 1, 2001, Plaintiffs moved to remand the case to Superior Court of the District of Columbia, arguing that Defendants' notice to remove the case to federal court was inadequate. The Court, on May 30, 2002, ruled that Defendants' notice of removal was adequate under 28 U.S.C. § 1446. *See* Remand Opinion at 5-6. The Court observed that "Plaintiffs' filings have conceded that they do not contest this court's original jurisdiction over their claims." *Id.* at 4. Because Plaintiffs' Amended Complaint did not "mention any specific state statute or common law theory under which they seek recovery," *id.*, and refers to "principles of District of Columbia law, United States law, and international law," Am. Compl. Introduction, and to "principles of universal jurisdiction applicable to crimes against humanity, genocidal practices and human rights atrocities," *id.* ¶ 1, the Court concluded that it could exercise federal question jurisdiction

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5. Section 1446(a) states that "[a] defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a).

6. Section 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

under 28 U.S.C. § 1331, Remand Opinion at 4-5 ("Federal common law has established that issues of international law fall under federal jurisdiction.").[7]

On April 30, 2002, while Plaintiffs' Motion to Remand was still pending before the Court, Defendants filed separate Motions to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(6), and 8(a)(2).[8] Def. Deutsche Bank's Mem. of Law in Support of Mot. to Dismiss at 2-4 [hereinafter "Def Deutsche Bank's Mem."]; Woermann Line's Mem. of Law in Support of Mot. to Dismiss at 1-2 [hereinafter "Def. Woermann Line's Mem."]. In response to Defendants' Motions, Plaintiffs aver for the first time that their claims are based on "a federal common law action for genocide and enslavement." Pls.' Opp'n to

7. In their Opposition to Defendant Woermann Line's present Motion to Dismiss, Plaintiffs state: "As this Court has already concluded, the Herero claim sounds in international law. It is well-settled that '[t]he determination and interpretation of international law present federal questions. . . .'" Pls.' Opp'n to Mot. to Dismiss of Def. Woermann Line at 15-16 (citing Restatement (Third) of Foreign Relations Law of the United States, § 112(2) (1987)).

8. On March 20, 2003, Defendant Deutsche Bank filed a Notice of Withdrawal of Defense Based on Lack of Personal Jurisdiction. In Defendant Woermann Line's Reply, Defendant notified the Court that, "[a]lthough Woermann Line continues to believe . . . that the Amended Complaint also fails to satisfy the pleading requirement of Rule 8(a) of the Federal Rules of Civil Procedure, at this time Woermann Line withdraws its motion to dismiss on that ground, solely to obviate the need for the Court to address Plaintiffs' contention that they need 'merits discovery' from Woermann Line to respond to the Rule 8(a) arguments." Def. Woermann Line's Reply at 1 n.2.

Mot. to Dismiss of Def. Woermann Line at 18 [hereinafter "Pls.' Woermann Opp'n"]; *see also id.* at 16 (stating that "the Herero do not seek coverage of the Alien Tort Claim Act").[9] Plaintiffs opine that the "offenses committed at the behest and for the benefit of the defendant corporations against the Herero are violations of *jus cogens*[10] norms," *id.* at 6, and "[b]ecause violations of *jus cogens* norms are

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9. In addition, Defendants observed in their Memoranda in Support of their Motions to Dismiss that Plaintiffs cannot assert a claim under the Torture Victim Protection Act, 28 U.S.C. § 1350, because the statute does not apply to corporate entities; it only permits plaintiffs to aver liability against "individual[s]." Def. Deutsche Bank's Mem. at 12-13 (quoting the Torture Victim Protection Act, 28 U.S.C. § 1350). Plaintiffs fail to rebut this contention in their Opposition and note that their claims stem from "a federal common law action for genocide and enslavement." Pls.' Woermann Opp'n at 18.

10. In *Princz v. Federal Republic of Germany*, the D.C. Circuit defined a "*jus cogens* norm as a principle of international law that is accepted by the international community of States as a whole as a norm from which no derogation is permitted." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (quotations and citation omitted). The court went on to observe that, at least with regard to a state, *jus cogens* norms are violated if the state:

> practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Id. (quoting Restatement (Third) of Foreign Relations Law of the United States, § 702 (1987)).

the embodiment of evil, every nation is obligated to punish those responsible," *id.* at 8.

On June 30, 2003, the Court determined that it lacked personal jurisdiction over Defendant Woermann Line. *Herero Peoples Reparations Corp. v. Deutsche Bank AG*, Civ. No. 01-1868, slip op. at 7-17 (D.D.C. June 30, 2003) (memorandum opinion dismissing Plaintiffs' claims against Defendant Woermann Line for lack of personal jurisdiction). The Court rejected Plaintiffs' principal argument that Defendant Woermann Line was properly before the Court under a theory of "universal jurisdiction," noting that Plaintiffs failed to cite a single case in which a district court inferred "universal jurisdiction" over a civil Defendant. *Id.* at 11. Even under a traditional personal jurisdiction analysis, the Court held that it lacked specific or general jurisdiction over Defendant Woermann Line. *Id.* at 12-15. Finally, the Court rejected Plaintiffs' arguments that they were entitled to jurisdictional discovery before disposition of Defendant's motion to dismiss, holding that Plaintiffs failed to meet the standards justifying jurisdictional discovery expounded by the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 17-19.

Appendix B

II. DISCUSSION

A. *Threshold Jurisdictional Inquiry*

Defendant Deutsche Bank challenges both the Court's authority to hear this case (lack of Article III standing and subject matter jurisdiction) and the subsequent merits of the claim (failure to state a claim upon which relief can be granted). Def. Deutsche Bank's Mem. at 2-4. The Court, therefore, must consider as a threshold matter whether it has the authority to reach the merits. *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 101 (1998) (observing that the "absolute purity" of the jurisdiction-first rule is well established). "Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). "The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co.*, 523 U.S. at 94-95 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). In ascertaining whether or not the Court has authority to hear the merits of Plaintiffs' claims, however, "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Marathon Oil Co.*, 526 U.S. at 585; *see also Grand Council of the Crees and New England Coalition for Energy Efficiency and the Env't v. Federal Energy Regulatory Comm'n*, 198 F.3d 950, 954 (D.C. Cir. 2000) (observing that "it is entirely proper to consider whether there is prudential standing while leaving

the question of constitutional standing in doubt, as there is no mandated 'sequencing of jurisdictional issues'") (quoting *Marathon Oil Co.*, 526 U.S. at 584).

1. *Subject Matter Jurisdiction*

Defendant argues that the Court lacks jurisdiction over the subject matter of Plaintiffs' claims. Def. Deutsche Bank's Mem. at 12-28; Deutsche Bank's Reply at 16-25. While the *Marathon Oil* Court instructed federal courts to dispose of challenges to the court's authority to hear the subject matter of a claim first, *Marathon Oil Co.*, 526 U.S. at 587-88, Defendant's arguments do not properly contest the Court's jurisdiction over the subject matter in this case. Defendant asserts that Plaintiffs' claims present non justiciable controversies and issues of international comity subject to dismissal pursuant to Federal Rule of Civil Procedural 12(b)(1), for want of subject matter jurisdiction. Def. Deutsche Bank's Mem. at 15 n.14 ("Defendants' motion with respect to their political question and comity arguments is made under Rule 12(b)(l).").[11] Although Defendant cites

11. Defendant Deutsche Bank also argues that "plaintiffs purport to plead a common law claim only for violation of civil 'jus cogens norms,' but there is no such cause of action." Def. Deutsche Bank's Reply at 4 (footnote omitted). While Defendants do not state whether this argument should lead to dismissal pursuant to 12(b)(1) or 12(b)(6), the Supreme Court, in *Verizon v. Public Service Commission of Maryland*, noted that "'[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction.'" *Verizon v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 642-43 (2002) (quoting *Steel*

(Cont'd)

several district court decisions that are factually similar to the present case supporting the dismissal of a claim presenting a political question pursuant to Federal Rule of Civil Procedure 12(b)(1), *id.*, it appears that such an inquiry goes to the merits of the case and is more properly entertained under Rule 12(b)(6), *Johnsrud v. Carter*, 620 F.2d 29, 32-33 (3d Cir. 1980) (holding that dismissal based on the political question doctrine is properly entertained pursuant to Rule 12(b)(6)); *see also Franklin v. Massachusetts*, 505 U.S. 788, 801 n.2 (1992) ("While appellants asserted below that the courts have no subject-matter jurisdiction over this case because it involves a 'political question,' we recently rejected a similar argument in *Department of Commerce v. Montana*, 503 U.S. [442, 456-459 (1992)], and appellants now concede the issue."); *Baker v. Carr*, 369 U.S. 186, 198-99 (1962) ("In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. [However, i]n the instance of lack of jurisdiction the cause either does not 'arise

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(Cont'd)

Co., 523 U.S. at 89.); *see also* 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1350 n.8 (2d ed. 1990) ("When defendant's challenge to the district court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of plaintiff's case."). Therefore, the Court will entertain Defendant's argument with regard to the alleged absence of a cause of action under Rule 12(b)(6).

under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute. . . . Under the present heading of 'Jurisdiction of the Subject Matter' we hold only that the matter set forth in the complaint does arise under the Constitution and is within 28 U.S.C. § 1343."); *Colegrove v. Green*, 328 U.S. 549, 552 (1946) ("We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.'"); 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1350 n.8 (2d ed. 1990); *but see Joo v. Japan*, 172 F. Supp. 2d 52, 54 & n. 1 (D.D.C. 2001) (dismissing plaintiffs' World-War II era claims as nonjusticiable under the political question doctrine pursuant to Rule 12(b)(1)), *aff'd on other grounds*, 332 F.3d 679 (D.C. Cir. 2003); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284 (D.N.J. 1999) (same).

The political question doctrine necessarily requires the Court to look to the merits of Plaintiffs' claims; even when a court declines to hear a case based on justiciability, it has gone beyond the "threshold" jurisdictional inquiry. As a result, the Court concludes that Defendant's political question and international comity arguments do not validly challenge the Court's jurisdiction over the subject matter of Plaintiffs' claims.[12]

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12. Moreover, because the Court finds, *infra*, that Plaintiffs have failed to state a valid cause of action, the Court will not consider Defendant's political question and international comity arguments under its merits inquiry.

Appendix B

2. *Standing*

Defendant also argues that Plaintiffs lack standing. Def. Woermann Line's Mem. at 8-11 (incorporated by Def. Deutsche Bank); Def. Woermann Line's Reply at 16-19 (same). Article III of the Constitution limits federal courts' jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. The Supreme Court has indicated that the Standing doctrine is a prerequisite to ascertaining the limits of federal courts' authority under Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"). In *Lujan v. Defenders of Wildlife*, the Supreme Court explained that, "[o]ver the years, our cases have established that the irreducible constitutional minimum of standing contains three elements." *id.* These three elements require that a plaintiff "demonstrate [1] that he has suffered an injury in fact, [2] that the injury is fairly traceable to the actions of the defendant, and [3] that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Defenders of Wildlife*, 504 U.S. at 560-61) (internal quotation marks omitted).

Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden or proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883-889 (1990)). Therefore, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss

we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *id.* (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 889).

In the present suit, Plaintiffs can be divided into three distinct groups for purposes of evaluating standing: the Herero People's Reparations Corporation ("Corporate Plaintiff'), the Herero Tribe ("Tribal Plaintiff"), and the individual members of the Herero Tribe ("Individual Plaintiffs"). Defendant contends that none of these Plaintiffs has standing. Notwithstanding Defendant's contention, if the Court determines that one of these Plaintiffs has standing to assert its claims against Defendant, the Court then must address Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Therefore, the Court will begin its standing inquiry with Individual Plaintiffs.

a. *Individual Plaintiffs*

Defendant argues that Individual Plaintiffs fail to satisfy the three-part Article III standing inquiry delineated in *Lujan v. Defenders of Wildlife*. Def. Woermann Line's Mem. at 9-10; Def. Woermann Line's Reply at 16-17. Specifically, Deutsche Bank contends that Plaintiffs have failed to demonstrate "that any Individual Plaintiff suffered any direct injury from the wrongful acts that purportedly took place in Southwest Africa between 1890 and 1915, or that any Individual Plaintiff is the heir, successor or assign of any Herero who was purportedly injured by Defendants during that period." Def. Woermann Line's Reply at 16.

Appendix B

In their Opposition, Plaintiffs contest Defendant's characterization of the allegations advanced in this case. Plaintiffs argue that Individual Plaintiffs are "descendants of parents who were victims of defendant' [sic] atrocities." Pls.' Woermann Opp'n at 33. In support of this contention, Plaintiffs cite to the declaration of Kandjanatozombua Tjiha, an 86-year-old member of the Herero Tribe and named Plaintiff.[13] In this declaration, Tjiha claims:

> When I was young my parents and my family were forced to flee Namibia in Botswana because the Germans were killing Herero. . . .
>
> Members of my family were killed by the Germans simply because we were Herero. We were not at war and we were not fighting the Germans. . . .
>
> . . .
>
> I have suffered greatly as a result of the actions taken by the Germans. My family lost all of its possessions, and I am still enduring the emotional pain from those practices. . . .

Tjiha Decl. ¶¶ V-VIII. Plaintiffs continue by arguing that the Court "must look to the laws of residency of the decedent." Pls.' Woermann Opp'n at 33 (citing *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000)). According

13. It is worth nothing that, at the pleading stage, the Court assumes the veracity of all factual allegations set forth in Plaintiffs' Amended Complaint. *See Doe v. United States Dept of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985).

to Plaintiffs, "[c]ustomary succession law in southern Africa . . . is imbued with the centuries-old demands of the extended family." *Id.* (citing S. McCarthy, *Africa: The Challenge of Transformation* 10 (IB Taurus 1994)) (internal quotation marks and ellipses omitted). Plaintiffs also note that the specific injuries suffered by Individual Plaintiffs are alleged in the Amended Complaint. *See id.* at 35 (citing Am. Compl. ¶¶ 3(a) ("Individual named plaintiffs . . . seek relief as a consequence of the genocidal destruction of the Herero Tribe."), 3(b) ("Individual named plaintiffs . . . seek relief as a consequence of the genocidal destruction of the Herero Tribe and as consequence of defendants' participation in Imperial Germany's compulsory abuse of Herero women or 'comfort women.'")). Finally, Plaintiffs argue that these injuries may be "reasonably inferred from the factual allegations in paragraphs 4 through 165 in the Complaint." *Id.*

In resolving this matter, the Court again observes that Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden or proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561 (citing *Nat'l Wildlife Fed'n*, 497 U.S. at 883-889). At the pleading stage, the Court must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Bennett*, 520 U.S. at 168 (quoting *Defenders of Wildlife*, 504 U.S. at 561) (quotation marks omitted). However, in reaching this determination, the Court makes no conclusion regarding whether or not Plaintiffs' present allegations would survive the Court's standing inquiry at the summary judgment stage,

where Plaintiffs would have to set forth by affidavit or other evidence specific facts to survive a motion for summary judgment. Fed. R. Civ. P. 56(e). At the pleading stage, Individual Plaintiffs have satisfied their burden. Individual Plaintiffs have alleged both personal injuries and injuries to their heirs, successors or assigns, purportedly under south African law.[14] *See* Am. Compl. ¶ 3.

Because Individual Plaintiffs have established standing at the pleading stage of this litigation, and because the Court has determined, *infra*, that Plaintiffs have failed to state a claim upon which relief can be granted, the Court need not consider whether Corporate Plaintiff or Tribal Plaintiff has standing. Each Plaintiff advances its claims under the same legal theory, and the Court finds that this legal theory does not incorporate a valid cause of action. As a result, even if the Court determined that Corporate Plaintiff or Tribal Plaintiff had standing, the Court would nonetheless dismiss their claims for failure to state a valid cause of action.[15]

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14. Defendant does not appear to dispute that the Court must look to south African intestate law to resolve Plaintiffs' claims. *See* Def. Woermann Line's Reply at 16-17 (incorporated by Def. Deutsche Bank).

15. If Individual Plaintiffs lacked standing, the Court would be required to determine whether or not Corporate and Tribal Plaintiffs have standing. Indeed, the Court would have been compelled to do so based on Article III's "Cases" or "Controversies" requirement. Given the fact that Individual Plaintiffs can assert standing at this stage of the litigation, however, the Court's determination on the merits of Plaintiffs' claims is not barred by the Constitution, nor does it constitute an advisory opinion.

Appendix B

B. *Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted*

1. *Legal Standard*

In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), a court will not grant the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Accordingly, at this early stage in the proceedings, the Court assumes the veracity of all factual allegations set forth in Plaintiffs' Amended Complaint. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Moreover, "[t]he complaint must be 'liberally construed in favor of the plaintiff,' who must be granted the benefit of all inferences that can be derived from the facts alleged." *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). Nonetheless, the Court is not bound to accept the legal conclusions of the non-moving party. *See Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997).

2. *Plaintiffs' "Federal Common Law" Claims*

In Plaintiffs' Opposition, they note that "the Herero do not seek coverage of the Alien Tort Claim Act," 28 U.S.C. § 1350. Pls.' Woermann Opp'n at 16. Moreover, Plaintiffs do not advance their claims under the Torture Victim Protection Act, 28 U.S.C. § 1350. *See supra* note 9. Rather,

Plaintiffs state that their claims are based exclusively[16] on "a federal common law action for genocide and enslavement." Pls.' Woermann Opp'n at 18. As the Court has indicated above, Plaintiffs argue that the "offenses committed at the behest and for the benefit of the defendant corporations against the Herero are violations of jus cogens norms," *id.* at 6, and "[b]ecause violations of jus cogens norms are the embodiment of evil, every nation is obligated to punish those responsible," *id.* at 8.

In response, Defendant argues that there is no federal cause of action for a violation of civil jus cogens norms. Def. Deutsche Bank's Reply at 4. Observing that Plaintiffs have disavowed themselves of the Alien Tort Claims Act and abandoned the Torture Victim Protection Act, *id.* at 4 & n.3, Defendant contends that there is a difference between the "substance of customary international law [and] its effect in U.S. federal court," *id.* at 5 (emphasis in original). According to Defendant, "[c]ourts across the United States have rejected the application of asserted jus cogens norms as the sole basis for a cause of action." *id.* at 5-6 (citing cases, *id.* at 5 n.6).

Before considering whether or not Plaintiffs' claims present a valid cause of action, the Court notes that Plaintiffs did consider the need for a cause of action in their Opposition. Pls.' Woermann Opp'n at 15. In a subsection heading addressing Defendants' statute of limitations argument,

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16. Plaintiffs implicitly concede that their claims are based "exclusively" on a federal common law claim. *See* Pls.' Woermann Opp'n at 16 ("However, none of the cases Defendants cite to support this proposition involved a claim exclusively invoking the federal common law.") (emphasis added).

Appendix B

Plaintiffs contend that "international law, operating through the federal common law, provides both the cause of action and its associated prescription rule." *Id.* (capitalizations altered). After stating this proposition in the subsection heading, however, Plaintiffs failed to cite to a single authority in support of their contention that international law, alone, provides a cause of action, nor do they even address the matter further. *See id.* at 15-16; *see also generally id.*; Pls.' Deutsche Bank Opp'n.

In ascertaining whether or not Plaintiffs' "federal common law action" presents a valid cause of action, the Court will begin by looking at precedent in the District of Columbia Circuit. Although this exact question appears to be a matter of first impression in this Circuit, the Court believes that District of Columbia Circuit precedent clearly counsels against recognizing a cause of action for violations of international law in the absence of a federal statute. The Court will then turn to the decisions of other federal courts and conclude by briefly reviewing the Restatement of Foreign Relations Law of the United States.

In *Tel-Oren v. Libyan Arab Republic*, the United States Court of Appeals for the District of Columbia Circuit grappled with the meaning of the Alien Tort Claims Act, "an aged but little-noticed provision in the First Judiciary Act of 1789." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984). In *Tel-Oren*, "survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel" filed suit against the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab

Americans, and the Palestine Congress of North America. *Id.* The Court of Appeals affirmed the district court's dismissal of the plaintiffs' claims, but the court set out its decision in three separate concurring opinions.[17] *Id.* Although no consensus was reached among the Judges, a majority of the court explained that violations of international law do not provide a cause of action in the absence of a federal statute. *See id.* at 778 n.2 (Edwards, J., concurring) ("Similarly, for two hundred years, it has been established that the law of nations leaves up to municipal law whether to provide a right of action to enforce obligations created by the law of nations."); *id.* at 779 n.4 (Edwards, J., concurring) (declining to imply right of action under the federal question jurisdictional statute, 28 U.S.C. § 1331, for violations of international law because "the law of nations consciously leaves the provision of rights of action up to the states"); *id.* at 799 (Bork, J., concurring) ("Neither the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States."); *id.* at 810 (Bork, J., concurring) (rejecting appellants' contention that "federal common law automatically provides a cause of action for international law violations"). Circuit Judges Edwards and Bork simply disagreed over whether the Alien Tort Claims Act provided a cause of action for

---

17. Judge Edwards affirmed the district court's holding because he could not "conclude that the law of nations . . . outlaws politically motivated terrorism." *Tel-Oren*, 726 F.2d at 796 (Edwards, J., concurring). Judge Bork concluded that "appellants have failed to state a cause of action sufficient to support jurisdiction under either of the statutes on which they rely." *Id.* at 799 (Bork, J., concurring). Senior Judge Robb held that the case presented a nonjusticiable political question. *Id.* at 823 (Robb, J., concurring).

violations of international law; neither judge contended that, in the absence of a federal statute, a violation of international law provided a cause of action in and of itself. To illustrate, Judge Edwards sided with the Second Circuit's holding in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which held that the Alien Tort Claims Act provided federal courts with subject matter jurisdiction and alien plaintiffs with a cause of action. *Id.* at 777. Although Judge Edwards concluded that the Alien Tort Claims Act provided a cause of action, he noted that, "for two hundred years, it has been established that the law of nations leaves up to municipal law whether to provide a right of action to enforce obligations created by the law of nations." *Id.* at 778 n.2 (Edwards, J., concurring) (emphasis added); *see also id.* at 779 n.4 (Edwards, J., concurring) (declining to imply right of action under the federal question jurisdictional statute, 28 U.S.C. § 1331, for violations of international law because "the law of nations consciously leaves the provision of rights of action up to the states"). Thus, Judge Edwards did not hold that, in the absence of a federal statute, violations of international law provide a cause of action; rather he concluded that a federal statute, the Alien Tort Claims Act, provided such a cause of action in *Tel-Oren*. By contrast, Judge Bork concluded that the Alien Tort Claims Act does not provide a cause of action. Following this conclusion, however, Judge Bork expounded that violations of international law, alone, do not provide private rights of action. Indeed, Judge Bork observed:

> Appellants' argument that they may recover damages for violations of international law is simple. International law, they point out, is part

> of the common law of the United States. This proposition is unexceptionable. *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). But appellants then contend that federal common law automatically provides a cause of action for international law violations, as it would for violations of other federal common law rights. I cannot accept this conclusion.

Id. at 810 (Bork, J., concurring).

Although the *Tel-Oren* court failed to settle whether the Alien Tort Claims Act provides a cause of action,[18] a majority of the court rejected Plaintiffs' proposition — that violations of international law, alone, provide a cause of action. Language from a more recent case decided by the District of Columbia Circuit is also contradictory to Plaintiffs' contention. In *Princz v. Federal Republic of Germany*, "Hugo Princz, a Holocaust survivor, brought suit in the district court against the Federal Republic of Germany to recover money

18. This question still appears to be unsettled in this Circuit. In *Joo v. Japan*, the Court of Appeals noted that — in affirming the district court's dismissal of alien plaintiffs' claims under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 — it did "not decide whether the Alien Tort Statute creates a cause of action." *Joo v. Japan*, 332 F.3d 679, 681-82 (D.C. Cir. 2003); *see also id.* at 687 ("Having found no jurisdictional predicate under the FSIA, we have no need to determine whether the [Alien Tort Claims Act] creates a cause of action for a violation of customary international law."). The fact that a statute is arguably needed to create a cause of action suggests that in the absence of a statute, violations of international law do not provide a private right of action.

damages for the injuries he suffered and the slave labor he performed while a prisoner in Nazi concentration camps." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1994). Because the plaintiff's claims were brought against a sovereign nation, the Foreign Sovereign Immunities Act ("FSIA") of 1976 applied. *Id.* In determining that violations of *jus cogens* norms by the Third Reich did not constitute an implied waiver of sovereign immunity under FSIA, *id.* at 1174, the District of Columbia Circuit noted:

> While it is also true that "international law is a part of our law," *Paquete Habana*, 175 U.S. at 700, it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction.

Id. at 1174 n.1. Although the Princz court was addressing whether or not the violation of *jus cogens* norms warranted an expansive reading of FSIA, the court's language supports the proposition that, absent a federal statute, violations of international law do not provide a private right of action. In fact, the *Princz* court observed:

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong.

Id. Likewise, something more is needed before this Court infers a private right of action from the violations of international law.

Appendix B

The fact that Congress has provided at least one statute that provides such a cause of action (the Torture Victim Protection Act) cautions against the construction of another by judicial fiat.[19]

A review of precedent from around the country is equally damaging to Plaintiffs' contention. For example, in *White v. Paulsen*, the United States District Court for the Eastern District of Washington considered whether the plaintiffs' "'crimes against humanity'" claim created a private cause of action. *White v. Paulsen*, 997 F. Supp. 1380, 1382 (E.D. Wash. 1998). The court ultimately declined "to imply from the law of nations the existence of a private right of action." *Id.* at 1385. In *Handel v. Artukovic*, the United States District Court for the Central District of California held that "[t]he law of nations . . . does not provide plaintiffs with a private right of action in this municipal court." *Handel v. Artukovic*, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985). Likewise, in *Xuncax v. Gramajo*, a case cited by Plaintiffs to support a different proposition, Pls.' Woermann Opp'n at 42-43, the United States District Court for the District of Rhode Island concluded that "international law is not itself a source of private rights of action." *Xuncax v. Gramajo*, 886 F. Supp. 162, 194 (D.R.I. 1995). This Court could go on to cite several other cases that reject Plaintiffs' contention, but that is not necessary. It appears beyond dispute that violations of international law, alone, do not provide private rights of action.

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19. At least until the question is settled by this Circuit, it is debatable that a second statute (the Alien Tort Claims Act) likewise provides a private cause of action.

Finally, the Court notes that the Restatement of Foreign Relations Law of the United States fails to support Plaintiffs' contention. Indeed, the Restatement (Second) of Foreign Relations Law states that a violation of international law gives individual litigants such remedies or defenses in a forum of a state "*as are provided by domestic law.*" Restatement (Second) of Foreign Relations Law of the United States § 3 (1965) (emphasis added). In the Third Restatement, its authors observe that whether individual human rights victims "have a remedy under the law of a state depends on that state's law." Restatement (Third) of Foreign Relations of the United States § 703 cmt. c (1987). Thus, Plaintiffs' claims are not even supported by the Restatements.

Given that the District of Columbia Circuit does not appear to recognize a private right of action for violations of international law; numerous federal courts, passing directly on this question, have declined to infer a private right of action in the absence of a federal statute; and the Restatement of Foreign Relations Law fails to support such a proposition, the Court is left to conclude that Plaintiffs have failed to present a valid cause of action. Accordingly, Plaintiffs have failed to state a claim upon which relief can be granted, and the Court will dismiss their Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

3. *Plaintiffs' Contention that they are Entitled to Amend their Complaint*

Plaintiffs aver: "In the event that the Court determines that the Complaint fails to satisfy the requirements of Rule 8 or Rule 12, plaintiffs are entitled to the opportunity to meet

those objections by amendment." Pls.' Deutsche Bank Opp'n at 8 (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1357 (2d ed. 1990)). Plaintiffs have not filed a motion to amend pursuant to Federal Rule of Civil Procedure 15, nor have they indicated to the Court how they plan to correct any potential deficiencies in their Complaint.

To the extent Plaintiffs contend that the statement in their Opposition constitutes a motion to amend pursuant to Rule 15, the Court cannot accept Plaintiffs' argument; it is contrary to the practice in this Circuit. In *Government of Guam v. American President Lines*, the United States Court of Appeals for the District of Columbia Circuit rejected a similar argument raised in that case. *Government of Guam v. American President Lines*, 28 F.3d 142, 149-151 (D.C. Cir. 1994). Faced with a motion to dismiss, the plaintiffs in American President Lines were put on notice by the defendants of the potential deficiencies in their complaint. Rather than filing a motion to amend pursuant to Federal Rule of Civil Procedure 15(a), the plaintiffs filed their opposition, in which they indicated that they would assert alternative legal theories should the Court grant the defendants' motion to dismiss. *Id.* at 150. The Court of Appeals determined that such an action was insufficient to constitute a motion under Rule 15(a) to amend the complaint. *Id.*; *see also Confederate Memorial Assn v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993) ("We agree with several of our sister circuits that a bare request in an opposition to a motion to dismiss — without any indication of the particular grounds on which amendment is sought, *cf.* Fed. R. Civ. P. 7(b) — does not constitute a motion within the contemplation of Rule

15(a)."). Consequently, the Court will not construe Plaintiffs' statement in its Opposition as a motion to amend and will dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[20]

III. CONCLUSION

For the reasons stated above, Defendant Deutsche Bank's Motion to Dismiss is granted. An Order accompanies this Memorandum Opinion.

s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

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20. Plaintiffs have filed a Motion for Leave to File a Surreply in response to allegedly new factual arguments raised by Defendants in their Reply regarding the purported tolling of a statute of limitations. Because the Court does not consider Defendants' statute of limitations argument, the Court shall deny Plaintiffs' Motion for Leave to File a Surreply.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 01-01868 (CKK)

THE HERERO PEOPLE'S REPARATIONS CORPORATION, *et al.*,

Plaintiffs,

v.

DEUTSCHE BANK AG, *et al.*,

Defendants.

ORDER
(July 31, 2003)

For the reasons stated in the accompanying Memorandum Opinion, it is, this 31 of July, 2003, hereby

ORDERED that Defendant Deutsche Bank's Motion to Dismiss [#23] is GRANTED pursuant to Federal Rule of Civil Procedure 12(b)(6); it is further

ORDERED that Defendant Deutsche Bank's Motion for a Protective Order [#28] is

DENIED as moot; it is further

ORDERED that Defendants' Joint Motion for a Protective Order [#33] is DENIED as moot; and it is further

Appendix B

ORDERED that Plaintiffs' Motion to File Surreply [#45] is DENIED.

SO ORDERED.

s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED MAY 29, 2002 AND FILED MAY 30, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-CV01868 (CKK)

THE HERERO PEOPLE'S REPARATIONS CORPORATION, *et al.*

Plaintiffs,

v.

DEUTSCHE BANK AG, *et al.*

Defendants.

MEMORANDUM OPINION
(May 29, 2002)

This case comes before the Court on Plaintiffs' Motion to Remand the case to the Superior Court of the District of Columbia. Plaintiffs, the Herero People's Reparations Corporation and members of the Herero Tribe of Namibia, instituted the present suit in Superior Court of the District of Columbia, alleging that Defendants committed a variety of atrocities, including extermination, medical experimentation and forced labor, in violation of "District of Columbia law, United States law, and international law." On August 30, 2001, Defendants, Deutsche Bank AG, Terex Corporation, and Woermann Line, successfully removed the case to the United States District Court for the District of Columbia.

Appendix C

Plaintiffs now contend that the case should be remanded back to Superior Court of the District of Columbia due to defects in Defendants' Notice of Removal. Upon consideration of Plaintiffs' motion, Defendants' opposition thereto, Plaintiffs' reply, and the relevant law, the Court concludes that Plaintiffs' motion shall be denied.

I. BACKGROUND

Plaintiffs allege that during-the late Nineteenth and early Twentieth centuries, Defendants, in cooperation with the government of Imperial Germany, engaged in "explicitly sanctioned extermination, the destruction of tribal culture and social organization, concentration camps, forced labor, medical experimentation and the exploitation of women and children in order to advance their common financial interests." Plaintiffs' Complaint ("Compl.") Introduction. Plaintiffs filed suit pursuant to D.C. Code § 11-921[1] and "on principles of universal jurisdiction applicable to crimes against humanity, genocidal practices, and human rights atrocities." Compl. ¶ 1. Defendants removed the case to United States District Court for the District of Columbia under 28 U.S.C. § 1441, which provides in relevant part that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Pursuant

1. Section 921 states in relevant part: "the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia." D.C. Code § 11-921

to the requirements of 28 U.S.C. § 1446(a),[2] Defendants' stated that Plaintiffs' claims of jurisdiction based on "United States law" and "international law" placed the case under federal question jurisdiction pursuant to 28 U.S.C. § 1331.[3] Defendants' Notice of Removal ¶¶ 2, 3. Plaintiffs then filed the present motion to remand pursuant to 28 U.S.C. § 1447(c), which states in relevant part that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." Plaintiffs argue that Defendants' notice to remove the case to federal court was inadequate. Plaintiffs' Motion to Remand ("Pl. Mot.") at 1. Specifically, Plaintiffs contend that "[w]hile this Court may have original subject matter jurisdiction over the claims of the Plaintiffs, the failure of the Defendants to affirmatively assert the basis of the court's jurisdiction constitutes a defect which mandates remand. . . ." *Id.* at 2.

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2. Section 1446(a) states that "[a] defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a)

3. Section 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331

Appendix C

II. DISCUSSION

A party's burden for removal under 28 U.S.C. § 1446 is not great. The moving party must provide a notice of removal "containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Generally,

> detailed grounds for removal need not be set forth in the notice. Rather, it should be sufficient if the court is provided the facts from which removal jurisdiction can be determined. Thus, the same liberal rules employed in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of removal.

14C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3733, at 356 (1998); *see also Allman v. Hanley*, 302 F.2d 559, 562 (5th Cir. 1962) ("The absence of detailed grounds setting forth basis for removal is not fatal to Defendants' right to remove.").

The issue of whether this Court has jurisdiction over the Plaintiffs' action is not disputed. Plaintiffs' filings have conceded that they do not contest this court's original jurisdiction over their claims. Pl. Mot. at 2 ("While this Court may have original jurisdiction over the claims of the plaintiffs, the failure of defendants to affirmatively assert the basis of the court's jurisdiction constitutes a defect which mandates remand. . . ."); Pl. Reply at 5 ("It is, of course, irrelevant that plaintiffs do not contest jurisdiction. . . ."). The present motion instead concerns the adequacy of

Defendants' Notice of Removal. As stated above, the pleading requirements for a Notice of Removal are minimal. Defendants have provided the Court with a notice referencing the Plaintiffs' complaint, indicating that the suit involves issues of federal and international law. Plaintiffs do not argue that they wish to bring this case under a state cause of action. It is well established that

> [t]he presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). In the present case, Plaintiffs' complaint, motion to remand, and reply to Defendants' memorandum do not mention any specific state statute or common law theory under which they seek recovery. Their complaint refers to "principles of District of Columbia law, United States law, and international law," and to "principles of universal jurisdiction applicable to crime [sic] against humanity, genocidal practices and human rights atrocities." Compl. Introduction, ¶ 1.

Federal question jurisdiction under 28 U.S.C. § 1331 has been found to include "claims founded upon federal common law as well as those of a statutory origin." *Nat. Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471

U.S. 845, 850 (1985) (citation omitted). Federal common law has established that issues of international law fall under federal jurisdiction. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) ("Federal jurisdiction over cases involving international law is clear."); *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (J. Bork, concurring) ("[I]nternational law . . . is part of the common law of the United States. This proposition is unexceptionable."); Restatement (Third) of Foreign Relations Law of the United States, § 112(2) (1987) ("The determination and interpretation of international law present federal questions . . .").

Moreover, the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), concluded that the scope of the "act of state doctrine," which precludes U.S. courts from inquiring into the validity of the public acts committed by a recognized foreign sovereign power within its own territory, "must be determined according to federal law." 376 U.S. at 427. Plaintiffs' complaint alleges that Defendants committed acts "in a brutal alliance with Imperial Germany," Compl. Introduction, implicating this area of federal common law. Therefore, these claims fall under federal court jurisdiction.[4]

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4. Moreover, this Court notes that its conclusion that federal subject matter jurisdiction exists in this case is not a decision regarding the question of whether the Plaintiffs have stated a federal cause of action. This issue has been raised in Defendants' Motions to Dismiss which is still pending before this court. Additionally, if evidence in this case presented at a later date reveals that the court in fact lacks subject matter jurisdiction, the Court may remand the case to the Superior Court of the District of Columbia under 28 U.S.C. 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

Appendix C

III. CONCLUSION

After consideration of Plaintiffs' motion, Defendants' opposition thereto, Plaintiffs' reply, and the relevant law, the Court concludes that the remand of this case to the Superior Court of the District of Columbia is improper. Accordingly, Plaintiffs' motion for remand shall be denied. An appropriate Order accompanies this Memorandum Opinion

Dated: May 29, 2002

s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

(2)

No. 04-347

Supreme Court, U.S.
FILED
OCT 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HERERO PEOPLE'S REPARATION CORPORATION, *et al.*,

Petitioners,

v.

DEUTSCHE BANK, A.G., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DEUTSCHE BANK, A.G.

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QUESTIONS PRESENTED

1. Should this Court issue an advisory opinion "clarif[ying]" whether a private right of action exists under federal common law for violations of customary international law, when Petitioners did not raise this question below and do not contend their complaint stated such a claim?

2. Did the courts below err by following the firmly established rule that when a well-pleaded complaint expressly seeks recovery under federal law, its failure to state a valid federal claim does not deprive the District Court of subject matter jurisdiction?

STATEMENT PURSUANT TO RULE 29.6

Deutsche Bank, A.G. ("Deutsche Bank") has no parent company. To Deutsche Bank's knowledge and belief, no public company has reported owning 10 percent or more of the stock of Deutsche Bank.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
Summary of the Argument	5
Reasons for Denying the Petition	7
I. Petitioners' Claim That A Private Right Of Action Exists For Violations Of Customary International Law Was Not Raised In The Court Of Appeals	8
II. The Lower Courts, Applying Nearly Six Decades Of Unbroken Precedent, Correctly Retained Jurisdiction	12
A. Settled Law Precludes Petitioners' Argument That Their Failure To Plead A Valid Federal Claim Mandated A Remand For Lack Of Subject Matter Jurisdiction	12

Contents

Page

B. There Is No Substantial Issue Of Federal Law Concerning The Technical Adequacy Of The Notice Of Removal 17

C. The Decision Below Does Not Offend Principles of "Comity" 17

III. Alternative Grounds 18

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) ... 10

Albingia Versicherungs A.G. v. Schenker Int'l Inc., 344 F.3d 931 (9th Cir. 2003), *amended on rehearing*, 350 F.3d 916 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2162 (2004) 14

American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916) 15, 16

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 15

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) 10

Bell v. Hood, 327 U.S. 678 (1946) ..... *passim*

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 15, 16

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 10

Hawkins v. National Ass'n of Sec. Dealers Inc., 149 F.3d 330 (5th Cir. 1998) 14

Cited Authorities

Page

International Science & Tech. Institute, Inc. v. Inacom Communications, Inc., 106 F.3d 1146 (4th Cir. 1997) 16

Kentucky v. Stincer, 482 U.S. 730 (1987) 10

Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986) 15

Miller v. Norfolk & Western Railway Co., 834 F.2d 556 (6th Cir. 1987) 16

Pueblo Int'l, Inc. v. De Cardona, 725 F.2d 823 (1st Cir. 1984) 14

Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) 11

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 11, 12, 13

Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004) 15

Verizon Maryland Inc. v. Public Serv. Comm'n, 535 U.S. 635 (2002) 13

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

Cited Authorities

Page

Consitutional Provisions, Statutes and Rules:

U.S. Constitution, Article III 11

28 U.S.C. § 1331 ..... 1, 2, 17

Alien Tort Statute, 28 U.S.C. § 1350 ..... 2, 3, 4, 11

Torture Victim Protection Act,
Pub. L. 102-256,
106 Stat. 73 (enacted Mar. 12, 1992)
(codified as Note to 28 U.S.C. § 1350) 3

28 U.S.C. § 1441 1

28 U.S.C. § 1446(a) 2, 17

28 U.S.C. § 1447(c) 2

Fed. R. Civ. P. 8(a) 18

Fed. R. Civ. P. 12(b)(6) 3, 12

U.S. Sup. Ct. R. 10 17

Other Authorities:

Jack H. Friedenthal et al., *Civil Procedure* § 2.4
(3d ed. 1999) 13

Restatement (Third) of Foreign Relations of the
United States 3

Respondent Deutsche Bank, A.G. ("Deutsche Bank") respectfully requests that the Supreme Court deny the petition of the Herero People's Reparation Corporation and individual members of the Herero Tribe of Namibia (collectively, "Petitioners" or "the Herero") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

Petitioners filed this action in the Superior Court of the District of Columbia on June 13, 2001. In their First Amended Complaint (the "Amended Complaint"), Petitioners alleged that Deutsche Bank participated, in some unspecified way, in atrocities perpetrated against the Herero between 1890 and 1915 during Imperial Germany's colonization of South West Africa, now Namibia. The one-count Amended Complaint expressly alleged violations arising under, *inter alia*, "United States law" and "international law." (Am. Compl. at 21.)

Deutsche Bank, together with its co-defendants Terex Corporation and Woermann Line, timely removed the action to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1441.[1] The Notice of Removal stated that the grounds for removal were the Amended Complaint's express allegations that Petitioners' claims arose under, *inter alia*, "United States law" and "international law," which gave rise to federal question jurisdiction pursuant to 28 U.S.C. § 1331. (Pet. at 7-8.)

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1. Petitioners later withdrew their claim against Terex Corp. (Pet. App. B at 8a, n.1.) The District Court dismissed Petitioners' claim against Woermann Line for lack of personal jurisdiction. (*Id.* at 8a, n.2.)

On October 1, 2001, Petitioners filed a "Motion to Remand the Case Pursuant to the First Sentence of 28 USC § 1447(c)" (the "Remand Motion"). That sentence provides that a motion to remand on grounds *"other than lack of subject matter jurisdiction"* must be filed within 30 days after removal. 28 U.S.C. § 1447(c) (2004) (emphasis added). In their accompanying memorandum of law, Petitioners conceded that federal question jurisdiction existed under 28 U.S.C. § 1331, and cited the Alien Tort Statute, 28 U.S.C. § 1350, as an additional potential source of federal jurisdiction. (Pls.' Mem. in Supp. of Remand Motion at 2 & n.3.) The Herero nevertheless sought a remand on the ground that the Notice of Removal was technically deficient in that it failed to describe the basis of federal jurisdiction in sufficient detail. (Pet. App. C at 39a.)

The District Court denied the Remand Motion in a Memorandum Opinion filed May 30, 2002. (Pet. App. C.) The District Court held that the Notice of Removal sufficiently identified the grounds of federal jurisdiction, satisfying 28 U.S.C. § 1446(a). (*Id.* at 41a-43a.) The District Court also independently confirmed that federal jurisdiction existed, based on the Amended Complaint's express reliance on "United States law" and "international law." (*Id.*)

While the Remand Motion was pending, Deutsche Bank (and, separately, Woermann Line) moved to dismiss the Amended Complaint on several grounds. In their briefs opposing these motions to dismiss, Petitioners clarified the basis for the action. The Herero asserted that the Amended Complaint "is unequivocal. It asserts, *inter alia*, that defendants have violated international law . . . ." (Pls.' Opp. to Deutsche Bank's Mot. to Dismiss at 8.) Petitioners expressly repudiated the Alien Tort Statute as the basis for

their claim. (Pet. App. A at 3a, n.1.) Instead, in the course of arguing that the action was not time-barred, Petitioners asserted that "international law, operating through the federal common law, provides both the cause of action and the associated prescription rule." (Pet. App. B at 27a.) However, as the District Court noted and as Petitioners later conceded in the Court of Appeals, Petitioners neither argued nor cited any authority establishing that the federal common law established a private right of action for violations of customary international law. (Pet. App. B at 27a; Oral Argument Tr. at 12 (Apr. 2, 2004).)

The District Court correctly noted that Petitioners did not assert any claims under the Alien Tort Statute or the Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (enacted Mar. 12, 1992) (codified as Note to 28 U.S.C. § 1350), but brought their lone claim under the federal common law. (Pet. App. B at 25a-26a; *id.* at 26a, n.16.) Relying on District of Columbia Circuit precedent, relevant cases decided by other federal courts of appeals, and the Restatement (Third) of Foreign Relations of the United States, the District Court refused to infer the existence of a federal common law cause of action for violations of customary international law. (*Id.* at 33a.) The District Court therefore held that Petitioners had failed to state a valid cause of action, and granted Deutsche Bank's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (*Id.*; *see also id.* at 36a.)

In the Court of Appeals, Petitioners did not raise the question they invite this Court to "clarif[y]" on certiorari: whether a federal common law action exists for violations of customary international law. (Pet. at 4.) Instead of challenging the District Court's decision on the merits,

Petitioners renewed their argument that the Notice of Removal was technically deficient. Petitioners also argued for the first time on appeal that subject matter jurisdiction was lacking, and that therefore the case should have been remanded to Superior Court.

Petitioners' jurisdictional argument took two forms. First, Petitioners argued that once the District Court determined that the Amended Complaint failed to assert a valid federal claim, federal subject matter jurisdiction did not exist. This argument was clearly untenable under a long line of well-settled Supreme Court precedents. *See, e.g., Bell v. Hood*, 327 U.S. 678 (1946). *Bell* and its progeny hold that when a well-pleaded complaint asserts a non-frivolous claim under federal law, the complaint's failure to state a valid theory of recovery results in dismissal on the merits – not for lack of federal jurisdiction. *See id.* at 682-83. At oral argument in the Court of Appeals, Petitioners ventured their second jurisdictional argument, claiming that their federal common law claim was so "insubstantial" that under *Bell*, the action should have been dismissed on jurisdictional grounds. (Tr. at 12.)

The Court of Appeals disagreed, and affirmed the District Court's holding that it had jurisdiction to decide Petitioners' claim on the merits. (Pet. App. A.) The Court of Appeals held that the Amended Complaint alleged at least an arguable claim under federal common law and the Alien Tort Statute. (*Id.* at 6a.) Because this claim was not "wholly insubstantial and frivolous," *cf. Bell*, 327 U.S. at 682-83, the Court of Appeals held that the action was properly dismissed on the merits rather than remanded for lack of jurisdiction. (Pet. App. A at 6a.) The Court of Appeals was not asked to decide, and did not address, whether a federal cause of action

exists for violations of customary international law, except to say that Petitioners' attempt to assert such a claim was "nonfrivolous." (*Id.*)

On September 9, 2004, the Herero filed the instant Petition for a Writ of Certiorari (the "Petition").

SUMMARY OF THE ARGUMENT

The first question presented in the Petition is whether this Court should "clarif[y]" whether the federal common law provides a private right of action for alleged violations of customary international law. (Pet. at *i*, 4.) By failing to raise this question in the Court of Appeals, Petitioners waived and abandoned any right to raise it here. Petitioners never appealed the dismissal of their claim on the merits. Even now, as they seek "clarification" of the abstract question set forth in the Petition, Petitioners do not assert that the Amended Complaint actually stated a valid federal claim. They merely ask this Court to "dispel the confusion and the uncertainty" in this area of the law. (Pet. at 6.) But this Court does not issue advisory opinions. Because Petitioners did not challenge the dismissal of their claim in the Court of Appeals, and because even now Petitioners do not affirmatively ask this Court to reverse that dismissal (but merely to clarify the law), the first question presented by the Petition is non-justiciable and lies beyond this Court's permissible constitutional authority.

The second question presented by the Petition raises no unsettled or substantial issues of federal law. Petitioners challenge the District Court's denial of their motion to remand the action to the Superior Court of the District of Columbia. They appear to renew their argument that

Respondents' Notice of Removal was technically deficient – a claim that is not only incorrect but that has no ramifications beyond this case. Petitioners also argue that once the District Court determined that the Amended Complaint failed to state a valid federal claim, the action should have been remanded to Superior Court. That argument is foreclosed by decades of well-settled precedent holding that unless a purported federal claim is "wholly insubstantial and frivolous" – which the Petition does not contend – the correct procedural outcome is dismissal on the merits, and not for lack of jurisdiction. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Petitioners' rhetoric about "comity" and the "dignitary interests" of the states (Pet. at 6, 10), moreover, rings hollow in light of their failure to identify any theory of recovery that they might pursue under state law (or local District of Columbia law). Indeed, a remand would make no sense in this case: Petitioners have never argued that the Amended Complaint asserted a supplemental state law claim,[2] and their only asserted federal claim was dismissed on the merits – a ruling that was unchallenged on appeal and is not challenged here. There is, accordingly, nothing left to be remanded. The petition should be denied.

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2. Although the Amended Complaint refers to "District of Columbia law" as well as "United States law" and "international law" (Am. Compl. at 21), Petitioners have disavowed any reliance on District of Columbia law. In the District Court, while arguing against the application of a statute of limitations borrowed from District of Columbia law, Petitioners asserted that their "claim sounds in international law." (Pls.' Opp. to Mot. to Dismiss of Def. Woermann Line at 15.) Attempting to distinguish cases cited by Respondents in support of their limitations argument, Petitioners argued that none of those cases "involved a claim *exclusively* invoking the federal common law." (*Id.* at 16 (emphasis added).) As the District Court noted, this was an implicit concession that Petitioners based their claim "exclusively" on the federal common law. (Pet. App. B at 26a, n.16.)

REASONS FOR DENYING THE PETITION

Neither of the two questions presented in the Petition merits review. The first was not argued in the Court of Appeals, and thus has been waived and abandoned. The second is foreclosed by a long line of well-settled precedents in this Court and the lower federal courts.

First, the Petition asks the Court to consider "[w]hether there is a private right of action recognized in federal courts for violation of fundamental principles of international law." (Pet. at *i*.) The District Court correctly held that Petitioners failed to state such a claim, and that ruling was not challenged on appeal. Petitioners nevertheless suggest that the decision of the Court of Appeals "invites clarification by this Court of the existence of a private cause of action for violations of customary international law." (Pet. at 4 (capitalization omitted).) Because this issue was not raised below, it should not be considered on certiorari.

Petitioners did not argue in the Court of Appeals that federal law created a private right of action for violations of customary international law. Nor did they argue that the Amended Complaint stated such a claim. Quite the opposite is true. In their attempt to defeat federal jurisdiction, Petitioners affirmatively argued that their purported federal claim for violations of customary international law met the "wholly insubstantial and frivolous" standard set forth in *Bell*, 327 U.S. at 682-83. (Tr. at 12.) Even now, in the Petition, the Herero do not argue that the Amended Complaint stated a valid federal claim, but only that the conceded absence of such a claim should have led to a remand rather than dismissal on the merits. Thus, the Petition is not an appropriate vehicle for this Court to consider the existence

of a federal right of action for violations of international norms, nor to issue a "clarification" concerning such a right of action. Petitioners neither preserved the issue for review nor developed an adequate record for this Court to consider. Moreover, because Petitioners themselves concededly did not assert any valid claim under federal law, any such "clarification" by this Court would be an improper and unconstitutional advisory opinion.

The second question presented fares no better. Petitioners ask whether, in light of their failure to plead a valid federal claim, the Amended Complaint should have been remanded to Superior Court for lack of subject matter jurisdiction. (Pet. at *i*, 6.) That argument is foreclosed by well-settled precedent, applied correctly by the courts below, and raises no substantial issues of federal law.

I. PETITIONERS' CLAIM THAT A PRIVATE RIGHT OF ACTION EXISTS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW WAS NOT RAISED IN THE COURT OF APPEALS

Petitioners raised three questions in the Court of Appeals: (1) whether the District Court erred by denying the Remand Motion, *discussed infra*, Part II; (2) whether the District Court erred by denying leave to amend the Amended Complaint; (3) and whether the District Court erred by dismissing the Amended Complaint as to Woermann Line for lack of personal jurisdiction. (Appellants' Br. at 1.) Petitioners did not argue that the District Court erred in holding that there was no federal common law cause of action for violations of customary international law. They did not urge the Court of Appeals to recognize such a cause of action. They did not contend that the Amended Complaint asserted a valid federal claim.

To the contrary, the Herero began their appeal by tacitly conceding their failure to state a valid federal claim, and ended their appeal by affirmatively arguing that position. In their opening brief, for example, the Herero asserted that the District Court erred "by failing to conclude that the absence of a private right of action was jurisdictional" – but not by concluding that no such right of action existed. (Appellants' Br. at 13.) This was the major theme of Petitioners' appeal: "In the absence of a private right of action, . . . the federal court lacks subject matter jurisdiction." (*Id.* at 21; *see also id.* at 14, 17-18 & 22; Appellant's Reply Br. at 1; Tr. at 15.)

This implicit recognition that the Amended Complaint failed to state a valid federal cause of action was made explicit at oral argument, when Petitioners' counsel argued that jurisdiction was lacking under *Bell v. Hood*'s "wholly insubstantial and frivolous" standard. *Bell*, 327 U.S. at 682-83. While avoiding the word "frivolous," Petitioners' counsel argued that their purported federal claim was insubstantial enough to defeat federal jurisdiction:

> [W]e're in the odd position of being a plaintiff saying the theory here is an insubstantial theory . . . . From plaintiffs' point of view, from the point of view of plaintiffs in human rights cases, it will be nice if we can marshal some authority to support the proposition that violations of international law carry with them rights of actions. We haven't asserted that affirmatively. We didn't marshal any authority.

(Tr. at 12.)

Having failed to argue in the Court of Appeals that the federal common law provides a private right of action for violations of customary international law, and having expressly argued the contrary position, the Herero are not permitted to seek "clarification" of that point in the Supreme Court. "Where issues are neither raised before nor considered by the Courts of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (citations omitted). *See also Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987) (explaining that "only in exceptional cases" will the Supreme Court "consider questions urged by a petitioner or appellant not pressed or passed upon in the courts below") (citation and internal quotation marks omitted); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (citations omitted). *See also Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (refusing to consider petitioners' claims that were not raised or addressed below). Petitioners' failure to argue that the Amended Complaint stated a valid federal claim meant that the Court of Appeals did not pass on the issue. As a consequence, the record does not squarely present the facts, precedents, and legal arguments necessary for the Supreme Court to consider carefully the question presented. *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (explaining that the Court's policy of not considering questions that were not raised below reflects "a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal.")

There is yet another fatal flaw in Petitioners' request for "clarification" of the existence of a private right of action for violations of international norms: the Petition does not assert that the Amended Complaint stated such a claim. The Herero urge a more abstract proposition: that granting

the Petition "will provide the Court with an opportunity to dispel the confusion and the uncertainty which permeates federal judicial treatment of claims sounding in fundamental violations of international law." (Pet. at 6.)

In this respect, Petitioners seem to be confessing that they were confused by this Court's recent ruling in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). In *Sosa*, the Court recognized that a limited class of actions alleging violations of customary international law may be brought under the Alien Tort Statute, 28 U.S.C. § 1350. Citing *Sosa*, Petitioners argue that "the Herero claims of slavery and of genocide each implicate a 'norm of customary international law so well defined . . .' that the contours of a private right of action can be charted with illumination by this Court." (Pet. at 5 (quoting *Sosa*, 124 S. Ct. at 2769).) Yet Petitioners fail to point out that they expressly disavowed any reliance upon the Alien Tort Statute. (Pet. App. A at 3a, n.1.) *Sosa* is thus entirely irrelevant to their Petition.

In the context of this case, any "clarification" of whether a federal cause of action exists for international law violations would constitute an improper advisory opinion Petitioners did not argue in the Court of Appeals, and do not assert in the Petition, that the Amended Complaint stated a valid claim for violations of international law. Having expressly disavowed any such argument in the Court of Appeals, and having argued that their purported federal claim was "wholly insubstantial and frivolous," Petitioners would not benefit from the "clarification" they seek. Thus, the requested "clarification" would amount to an improper advisory opinion, in violation of Article III limitations and this Court's established practice. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (affirming that advisory opinions have been "disapproved by this Court from the beginning") (citations omitted). There is no reason to depart from that practice now.

II. THE LOWER COURTS, APPLYING NEARLY SIX DECADES OF UNBROKEN PRECEDENT, CORRECTLY RETAINED JURISDICTION

Petitioners contend that once the District Court determined that they had failed to plead a valid federal claim, that court should have remanded the case for want of subject matter jurisdiction. (Pet. at *i*.) They also appear to renew their argument that the Notice of Removal was technically deficient. (*Id.* at 7-9.) Both arguments are patently incorrect, and neither merits review by this Court.

A. Settled Law Precludes Petitioners' Argument That Their Failure To Plead A Valid Federal Claim Mandated A Remand For Lack Of Subject Matter Jurisdiction

Petitioners contend that the District Court erred by dismissing this action on the merits under Rule 12(b)(6). In their fundamentally misguided view: "In the absence of a private right of action, . . . the federal court lacks subject matter jurisdiction." (Pet. at 12.)

This argument is foreclosed by nearly sixty years of precedent holding that the precise opposite is true: a well-pleaded complaint that invokes federal law is subject to the federal courts' jurisdiction, unless the asserted claim is "wholly insubstantial and frivolous." *See Bell*, 327 U.S. at 682-83. That remains true even if the District Court ultimately finds that the plaintiff failed to allege a valid federal claim. *See id.* As this Court held in *Steel Co.*:

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.

Steel Co., 523 U.S. at 89 (citations omitted) (italics in original). As *Bell* explains, there is sound reason for the federal courts' retaining jurisdiction over non-meritorious federal claims:

> [T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief . . . Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action.

Bell, 327 U.S. at 682. Thus, the jurisdictional inquiry does not turn on whether the plaintiff's claim is valid, but only on whether it is arguably valid, i.e., not "wholly insubstantial and frivolous." *See id.* at 682-83. As *Steel Co.* teaches:

> [T]he district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

523 U.S. at 89 (citations omitted). *Accord Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 643 (2002). This principle is so uncontroversial that it has become hornbook law. *See* Jack H. Friedenthal et al., *Civil Procedure* § 2.4 (3d ed. 1999) (explaining that a "claim may be dismissed for failure to state a claim on which relief can be granted, and yet be substantial enough to support federal jurisdiction") (footnotes and citations omitted).

The rule in *Bell* has been routinely and repeatedly applied in cases removed from state court. *See, e.g., Albingia Versicherungs A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 936 (9th Cir. 2003), *amended on rehearing*, 350 F.3d 916 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2162 (2004); *Hawkins v. National Ass'n of Sec. Dealers Inc.*, 149 F.3d 330 (5th Cir. 1998); *Pueblo Int'l, Inc. v. De Cardona*, 725 F.2d 823, 825-26 (1st Cir. 1984) (Breyer, C.J.). *Albingia* is instructive. The complaint alleged a violation of the Warsaw Convention; after removal, the purported federal claims were dismissed on the merits, but the District Court retained supplemental jurisdiction over the plaintiffs' state law claims. The Court of Appeals affirmed, holding that "[j]urisdiction existed because the pleading asserted, without frivolousness, that the Warsaw Convention gave Albingia a claim." *Albingia*, 344 F.3d at 936.

Federal jurisdiction exists in this case because under one reading of the federal common law – urged by Petitioners in the District Court – there is a private right of action for violations of customary international law. Under the contrary view, adopted by the District Court and unchallenged on appeal, the federal common law does not create any such cause of action. Federal courts have the power to decide whether a federal cause of action exists, and they do not lose jurisdiction if they determine that the asserted claim is not valid.

In any event, a remand would make no sense in this case (unlike, perhaps, *Albingia*), as Petitioners do not argue that the Amended Complaint states a supplemental claim under state law (or District of Columbia law). Thus, the only claim that could conceivably be remanded is the federal common law claim that the District Court held was not a valid cause

of action. It is also a claim governed by federal, not state, law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-27 (1964); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232-33 (11th Cir. 2004). Petitioners are not entitled to re-argue the merits of their federal claim in the Superior Court of the District of Columbia.

The cases cited by Petitioners are not to the contrary. The Herero cite *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) to argue that federal question jurisdiction is limited to cases in which (i) federal law creates the cause of action, or (ii) the plaintiff's claim necessarily turns on a substantial question of federal law. (Pet. at 11-12.) But Petitioners miss the obvious point: federal question jurisdiction exists here precisely because the Amended Complaint asserted a claim under federal law.[3] According to *Franchise Tax Board*, that is enough to sustain federal jurisdiction.

Petitioners nonetheless argue that in the "vast majority" of cases, "[a] suit arises under the law that creates the cause of action." (Pet. at 12 (quoting *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).) From that innocuous premise, Petitioners leap to the unsupported conclusion that their conceded failure to allege a valid federal claim means this action did not "arise under" federal law for jurisdictional purposes.

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3. As noted above, Petitioners argued in the District Court that "international law, operating through the federal common law, provides . . . the cause of action." (Pet. App. B at 27a.) They made the same point at oral argument in the Court of Appeals: "[T]he only basis, as far as any of us has alleged so far, has been the common law incorporation of the international law." (Tr. at 15.)

Apart from its sheer illogic, Petitioners' argument is belied by the case law in three respects. First, this Court has held that the principle relied on by Petitioners – that "[a] suit arises under the law that creates the cause of action," *American Well Works*, 241 U.S. at 260 – is a rule of inclusion, not exclusion. Where federal law does not create the asserted cause of action, federal question jurisdiction may still exist.[4] Second, Petitioners' argument is contrary to *Bell v. Hood's* holding that "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell*, 327 U.S. at 682. Third, this case falls within the "vast majority" of cases in which the asserted claim is a federal claim. As the courts below held, jurisdiction exists here because the well-pleaded Amended Complaint expressly alleged violations of "United States law" and "international law." (*See* Pet. at 4a; *id.* at 42a-43a.)[5]

4. The *American Well Works* rule is "more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." *Franchise Tax Bd.*, 463 U.S. at 9. The rule "has been rejected as an exclusionary principle." *Id.* (citations omitted).

5. Petitioners also cite two cases in which the Courts of Appeals supposedly held that "there was no federal jurisdiction . . . *because* there was no private right of action." (Pet. at 12 (italics added).) Petitioners misread the cases. In *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997), the plaintiff's claim arose under an unusual federal statute that gave the *state courts* exclusive jurisdiction over private damages actions. And in *Miller v. Norfolk & Western Railway Co.*, 834 F.2d 556, 567-68 (6th Cir. 1987), the federal courts lacked jurisdiction because the plaintiff alleged a garden-variety defamation claim arising under state law, or alternatively, because federal labor laws completely pre-empted the defamation claim and vested sole jurisdiction in a federal administrative panel. Either way, *Miller*, like *International Science*, is inapposite.

B. There Is No Substantial Issue Of Federal Law Concerning The Technical Adequacy Of The Notice Of Removal

Petitioners appear to renew their argument that the Notice of Removal was technically deficient. (Pet. at 7-9.) There is no reason for the Supreme Court to superintend the adequacy of the Notice of Removal – a question without any implications beyond this case. This is not the "rare[]" case warranting Supreme Court review of the lower courts' purported "misapplication of a properly stated rule of law." *Cf.* U.S. Sup. Ct. R. 10.

In any event, the courts below correctly rejected Petitioners' challenge to the adequacy of the notice. The Notice of Removal identified, among the stated grounds for removal, the Amended Complaint's express allegation that Petitioners' claims arose under "United States law" and "international law," giving rise to jurisdiction under 28 U.S.C. § 1331. (Pet. at 7-8.) The Notice of Removal thus easily satisfied the statutory requirement that it "contain[] a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a) (2004). The District Court held that the notice provided sufficient notice of the grounds for removal (Pet. App. C at 41a-42a), and the Court of Appeals affirmed. The technical sufficiency of the Notice of Removal does not merit the attention of this Court.

C. The Decision Below Does Not Offend Principles of "Comity"

Petitioners urge review of the Court of Appeals' affirmance of the District Court's denial of remand, citing "principles of comity with coequal state courts." (Pet. at 6.) They assert that the Court of Appeals' decision is somehow

an affront to "the states' dignitary interests in presiding over claims appropriate for state court resolution." (Pet. at 10.) But no state is involved in this case; Petitioners filed the action in the District of Columbia, which does not implicate the same considerations of comity as do the 50 states. Moreover, Petitioners' rhetoric about comity and dignity cannot overcome the simple fact that their sole claim was a federal common law claim. (*See* Note 2, *supra*.) The Petition does not assert that the Amended Complaint alleged a cause of action sounding in state law (or District of Columbia law). Thus, even if the federal seat of government were entitled to "dignitary" status equal to that of the 50 states, Petitioners' "comity" concerns would be entirely irrelevant.

III. ALTERNATIVE GROUNDS

The dismissal of the Amended Complaint must be affirmed on several additional or alternative grounds. Petitioners' claim is barred by the political question doctrine, by their lack of standing, and by the longest conceivably applicable statute of limitations. Dismissal must also be affirmed based on the Amended Complaint's failure to provide a "short and plain statement of the claim showing that the pleader is entitled to relief" against Deutsche Bank, *see* Fed. R. Civ. P. 8(a). All of these issues were raised and preserved by Deutsche Bank below, and all must be considered as grounds to affirm the dismissal of Petitioners' claim. At a minimum, these distinctive defenses complicate both the factual and legal issues presented, making this case a poor candidate for certiorari.

CONCLUSION

Petitioners do not contend that this Court must intervene to resolve a split of authority among the Courts of Appeals. The Petition does not raise any substantial federal question. Petitioners' jurisdictional argument is plainly incorrect, and any argument regarding the merits of Petitioners' underlying claim has not been preserved for this Court's review.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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